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A DIGEST

OF THE

CRIMINAL LAW

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(CRIMES AND PUNISHMENTS).

BY

SIR JAMES FITZJAMES STEPHEN, K.C.S.I., Q.C.

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ERRATA.

PAGE

175. At the end of the second line of Illustration (3.) *for* "B" *read* "C."

227. At end of Note (1) *for* "Article 241," *read* "Article 296."
Note (2) *for* "s. 405," *read* "s. 40."

267. Note (1) *for* "*R.* v. *Hill*, 2 Moo. C. C. 80," *read* "*R.* v. *Boardman*, 2 Moo. & Rob. 147."

275. Note (2) *for* "c. 28," *read* "c. 98."

ADDENDA.

87. At the end of Article 142, (b.) *add* "or, [5](*c.*) Obstructs or in any way interferes with, or knowingly prevents the execution of any legal process, civil or criminal."

[5] Cases collected in 1 Russ. Cr. 569-71.

104. Add at end of Note (1) "If the act done is a public and indecent exposure of the person the offender may on conviction be sentenced to hard labour. 14 & 15 Vict. c. 100, s. 29, and see Article 193 (*d.*), (*e.*)."

359. Eighth line from bottom of text *for* "deliberately" *read* "fatally."

In the Table of Statutes Cited *add*—

3 Edw. 1, c. 9 . . . . . p. 94.
14 & 15 Vict. c. 100, s. 29 . pp. 87, 89, 91, 336.

INTRODUCTION.

In 1874 a Bill for the Codification of the Law of Homicide, drawn by me, was introduced into Parliament by the Recorder of London, and was referred to a Select Committee. The Appendix to the report of the Committee contains a memorandum by the Lord Chief Justice of England, in which he said:

"I object to this bill, in the first place, as being a partial and imperfect attempt at codification.

"Though a strong supporter of codification, and deeply regretting that the law of England should be suffered to remain in its present state of confusion, arising from its being partly unwritten and partly in statutes so imperfectly drawn as to be almost worse than unwritten law, I think that any attempt at codification which is either partial or incomplete can only be productive of confusion and mischief. I object to the present bill as labouring under both these defects.

"The law relating to homicide forms only part of the law relating to offences against the person, while this, again, forms only a part of the Criminal Law in general.

"Many of the principles applicable to the branch now in question are common to the whole body of the Criminal Law. If introduced into the partial exposition of the law, they unnecessarily augment the bulk of the statute; if omitted, a question arises as to whether the omission is not intentional with a view to the exclusion of the principle or rule in the particular branch or department; and the more limited the branch of the law attempted to be dealt with the more marked, of course, the effect of the omission."

The Committee observed in their report:—"It has been strongly urged before your Committee that partial codification is a mistake, and that no measure should be passed until the whole of that branch of the law to which it belongs has been reduced to a series of simple and abstract propositions. Your Committee think that such a doctrine would be fatal to the prospect of producing any code." The Committee then proceeded to assign their reasons for thinking that the bill ought not to be proceeded with. It was accordingly dropped. I do not regret their decision, as I admit the force of the observations of the Lord Chief Justice, though I think they ought to be qualified by the remarks made upon them by the Committee. I felt, however, that the course taken by the Committee was a reason, not for laying aside the subject, but for attempting to exemplify the possibility and convenience of codifying the Criminal Law by performing, as a private enterprise, the work of making a Digest of it which might serve as a first step towards a Code. If properly executed, such a work would answer the Lord Chief Justice's objection in the only way in which it could be answered, that is to say, by complying, as far as it is possible for a private person to do so, with the condition which he considers essential to the utility of any attempt at codification—that it should be neither partial nor incomplete. Taken absolutely, this condition could be fulfilled only by a Code embracing the whole of the law upon every subject; but this, of course, cannot be the meaning of the Lord Chief Justice. Penal Codes have been enacted and have proved highly useful in many countries in which the law on other subjects has not been codified.

At all events, this work is the result of the fate of the Homicide Bill of 1874, and of other measures (especially Lord Coleridge's Evidence Bill of 1873) in which I have been concerned, and which, for various Parliamentary reasons, have not been proceeded with. It is in the nature of an appeal to the public at large from the judgment passed on the possibility of codification, not only by Parliament, but by many eminent members of the legal profes-

sion. The appeal is not made in a complaining spirit. On the contrary, I think that the codification of the law is a question which loses nothing by delay. I hope, for instance, that the subject of Homicide in this Digest is treated in a more satisfactory manner than it was in the Homicide Bill of 1874, and this is due to a considerable extent to the criticisms which were made upon that measure.

With regard to the general subject, I need not here repeat what I have said on other occasions on the subject of the present condition of the law: its substantial merits, its entire lack of system and arrangement, and the possibility of throwing it into a short systematic form. I have dwelt on these topics in prefaces to successive editions of my Digest of the Law of Evidence, and in a lecture on a Penal Code delivered very lately to the Congress of Trade Unions, and published in the *Fortnightly Review* for March 1877. On the other hand, I reserve for the new edition of my "General View of the Criminal Law" (which will form substantially a new work) what I have to say on the history of the Criminal Law, on its general characteristics, and on other subjects of the same kind. I confine myself, therefore, on the present occasion to a few observations on the contents of this Digest.

It is meant to be a complete statement of the whole of what I may call the working Criminal Law, but it does not take in every act which can in any sense of the word be regarded as a crime.

Disobedience to any statutory order is, generally speaking, a misdemeanor, but a book which comprised all statutory orders would be nearly co-extensive with the statute book itself.

Moreover, nearly every Act of Parliament contains sections rendering particular transgressions of its provisions punishable in various ways. This is sometimes effected by imposing penalties, to be sued for by the party aggrieved or by a common informer, sometimes by providing that persons who make false statutory declarations on particular subjects shall be liable to be punished as for perjury, that the omission to

perform particular statutory duties shall be a misdemeanor, and the like. It follows, indeed, from the very definition of law, that laws must be capable of being broken, and must be protected by sanctions if they are broken. It would be impossible to include these sanctioning provisions in a Penal Code, as many of them would be quite unintelligible if they were separated from the matter which they sanction. The Customs Act, *e.g.*, is full of penal sections which can be understood only in connection with the system which they are meant to enforce.

Moreover, in every system of legislation there must be a considerable number of offences which are dealt with as crimes in a sense so much less serious than that which is commonly attached to the word that they would not usually be so described. The Police Act, the Highway Act, and many other Acts inflict penalties of more or less severity for all sorts of petty offences, and the activity of Parliament adds to their number in almost every session. Speaking generally, the distinction between serious and inconsiderable offences coincides with the distinction between indictable offences, which may be compared to the French *crimes* and *délits*, and offences punishable on summary conviction, which may be compared to the French *contraventions*, and in some cases to the minor *délits*. As a general rule, I have confined myself to indictable offences, but it is a rule to which, for various reasons, I have made many exceptions. Thus, I have included offences relating to game and wild animals, partly because some of them are defined by the Larceny Act, being treated as thefts, and partly because the indictable and summary offences are mixed up together (see Chapter XLVIII.). Deer-stealing, *e.g.*, is indictable upon a second offence, the first offence being punishable on summary conviction (Article 386). On the other hand, I have not noticed the Wild Birds Protection Act, or the enactments intended to protect salmon rivers, as the offences which they create are punishable solely on summary conviction by very moderate fines. I have included the Vagrant Act, because an "incorrigible rogue" may be sentenced at the

quarter sessions to a year's hard labour, and it is impossible to define the expression "incorrigible rogue" without previously defining "rogue and vagabond," and "idle and disorderly person." The penalties, moreover, are exceedingly severe. On the other hand, I have omitted the offences defined in the Police Acts and the Highway Act as being too trifling to find a place in a Penal Code. The law as to assaults is a further illustration. The subject cannot be treated completely without giving the law as to summary convictions for assault (Chapter XXVIII.). So, too, having dealt with (Articles 394–5) the breaches of a shipowner's duty as to seamen as being indictable offences, I thought it best to include the duties of seamen to shipowners in the Digest (Articles 396–7), although breaches of them are punishable upon summary conviction only, as their omission would have given a one-sided view of the law. I regret this want of symmetry and principle, but it is impossible to give more of those good gifts to a legal system than it does in fact possess.

Upon the whole, this Digest is intended to give the whole of the law relating to each of those everyday offences which commonly occur in the administration of justice as fully and as shortly as is consistent with accuracy. I do not venture to say that it is quite complete, for the subject is so intricate and difficult that it would be rash to make such an assertion, but I do assert that it deals with every part of the substantive Criminal Law (as distinguished from the law of Criminal Procedure) which is dealt with in the text-books in common use, such as Russell on Crimes, Roscoe's Criminal Evidence, Archbold's Criminal Pleading, and the like, and with some others which, for various reasons, they omit.

Any offence not mentioned in these works would be rather an historical curiosity than a matter of practical importance. I fear, indeed, it will be found that the contents of my book err rather on the side of excess than on the side of defect. They include a great number of offences which have, on various grounds, become obsolete, and which ought to be repealed.

The works mentioned, and others of the same kind, have

both the merits and defects of English law-books in a conspicuous degree. They represent the result of an immense quantity of patient research, and of a minutely laborious and generally singularly accurate application of learning to a very unattractive subject, but they make no pretensions to any other merit. The last edition of Russell on Crimes contains (exclusive of indexes) 2672 closely printed royal 8vo. pages, and costs five guineas and a half. It is arranged in such a manner that its last editor takes credit for having improved it by transferring to the head of General Provisions "title Pleas of Autrefois Convict and Acquit, which was, in the former edition, in chapter 'Burglary,' and title 'Amendments at the Trial,' formerly under title 'Evidence.'" He adds: "The first chapter having been thus enlarged, it became advisable to decrease the size of the first volume, and it was thought that this might be conveniently done by transferring titles 'Bigamy' and 'Libel' to the third volume," where they are classed with a treatise on the Law of Evidence. The 18th edition of Archbold contains (exclusive of the index) 1012 very closely printed pages. I will say nothing of the arrangement, as I suppose no one ever paid the smallest attention to it, since the book was originally published more than fifty years ago. It has an arrangement, however, and a very perplexed one. A series of very able and learned persons, Lord Chief Justice Jervis, the late Mr. Welsby, and my friend Mr. Bruce, the stipendiary magistrate of Leeds, have devoted an infinite deal of trouble to the task of making it a complete magazine of every statute, every case, and every dictum of every text writer of reputation upon every subject connected with indictable offences and criminal pleading and procedure. It is an invaluable book of reference, but to try to read it is like trying to read a Directory arranged partly on geographical and partly on biographical principles. Roscoe's Criminal Evidence (8th edition) contains 1002 similar pages. As it does not deal with the subject of criminal pleading, it gives the cases more fully than Archbold. It is very complete and accurate, and is intelligibly arranged, as the matter is dealt with in alphabetical order.

The arrangement of my own work follows in the main that of the Indian Penal Code, and, I hope, explains itself. The only remark I have to make upon it is, that I have classed libel, bigamy, abduction, &c., with offences against the person, rather than offences against the property, of individuals, because reputation and parental and conjugal rights are inseparably annexed to the person, and cannot be transferred like rights of property.

The comparative brevity of the work has been obtained by the double process of extracting principles from cases, the facts being stated in the form of illustrations of the principles, and condensing the statutes. These processes may easily be made intelligible even to persons who are not lawyers.

It is not till a very late stage in its history that law is regarded as a series of commands issued by the sovereign power of the state. Indeed, even in our own time and country that conception of it is gaining ground very slowly. An earlier and, to some extent, a still prevailing view of it is, that it is more like an art or science, the principles of which are at first enunciated vaguely, and are gradually reduced to precision by their application to particular circumstances. Somehow, no one can say precisely how, though more or less plausible and instructive conjectures upon the subject may be made, certain principles came to be accepted as the law of the land. The judges held themselves bound to decide the cases which came before them according to those principles, and as new combinations of circumstances threw light on the way in which they operated, the principles were, in some cases, more and more fully developed and qualified, and in others evaded or practically set at nought and repealed. Thus, in order to ascertain what the principle is at any given moment it is necessary to compare together a number of decided cases, and to deduce from them the principle which they establish.

I will give a single illustration of this process. According to the original definition of theft, the commission of the offence requires a wrongful "taking." Suppose that A loses an article, and B finds it, and takes possession of it. Is this

such a "taking" as the definition required? The older authorities held that it was not. "If A find the purse of B in the highway, and take it and carry it away with all the circumstances that usually prove the *animus furandi*, as denying it or secreting it, yet it is not felony," says Hale.[1] The rule was probably one of the many devices which were employed in order to evade the atrocious severity of the ancient law of larceny. By degrees, however, its inherent absurdity led the judges (especially when the law became more humane) to explain it away. A series of decisions established distinctions as to the meaning of the expression "lost property." [2] It was held in several cases that things left in a hackney-coach by accident were not lost in such a sense as to excuse the hackney-coachman in taking them, and that a thing merely mislaid was not lost (as, for instance, a purse left on a stall in a market-place).

Most people would suppose that the result of such decisions would be to establish the principle, that any person who found things belonging to another, and subsequently appropriated them to himself, being aware of the fact that they were the property of another, would be guilty of theft. Such, however, was not the practical conclusion. The principle that the taking, and not the appropriation, constituted the crime of theft, determined the course of the decisions, even when they deviated from their original direction. By reason of it the judges finally decided that in cases of finding the question of theft or no theft depended upon the time when the knowledge necessary to a felonious intent was acquired, and that it might be stated thus: "Did the finder, at the time when he took possession of the goods, know, or had he reasonable ground to believe, that the goods belonged to another person, and that that other person could be found?" The question, whether after taking possession of them he obtained this knowledge or means of knowledge was held to be immaterial, inasmuch as an innocent taking could not be made criminal by reason of a subsequent guilty dealing with the thing taken.

[1] 1 Hale, P. C. 508. [2] 2 Russ. Cr. 166-9.

This for the time being is the law of the land, and it is very unlikely that it should be altered unless the Common Law definition of theft is entirely recast. The result may be thus illustrated: if a man picks up a £10 note in the street knowing that it is not his, but not knowing and not having reason to believe that the owner could be found, and if, half-an-hour afterwards, he obtains decisive proof of its ownership, he may after that convert it to his own use without committing any crime.

The principle must be regarded as at once distinct, complete, and unreasonable. It would never have been passed into law by any body of legislators. It is, indeed, hardly possible that persons acting in a legislative capacity should establish by law an obvious absurdity, but it is easy for successive generations of judges, none of whom are personally responsible for the law which they declare, to establish an unreasonable result by working out a principle, the imperfection and unreasonableness of which escaped notice till some special combination of facts brought it to light. It must, moreover, be borne in mind that the principle given above is not distinctly stated in any one place, or by any one writer of undoubted authority. In order to ascertain what it is it is necessary to examine Coke, Hale, Hawkins, East, and about thirty-four cases decided at different times within the last sixty or seventy years, an abstract of which cases fills something more than twenty pages of Russell on Crimes.[1] I have not taken the trouble to ascertain the length of the reports of these cases, but it must be very considerable. It is hardly possible to understand any one of them without reading it through and weighing all the circumstances. Every one of them contains statements which, though perhaps necessary to the full understanding of that particular case, are altogether unimportant for any other purpose. Each, again, must be considered in relation to all the rest, and although the result ultimately deduced from them may be short, the labour of obtaining that result is so great that no one could possibly perform it who had not

[1] 2 Russ. Cr. 165–187.

himself had a degree of experience of the actual working of the profession, which would in most cases indispose a man from taking the trouble of reducing his knowledge to the shape of a specific proposition. This is but a single illustration of the manner in which the law has grown up. I might multiply such instances indefinitely, but I forbear to do so, as they will suggest themselves to every reader of this work.

Difficult as the task of reducing the cases to order undoubtedly is, it would be wrong to exaggerate either its difficulty or its extent. Upon most of the important heads of Criminal Law the law may now be regarded as settled. This admits of easy proof.

The Court for Crown Cases Reserved was established by Act of Parliament (11 & 12 Vict. c. 78) in the year 1848. Since that time every doubtful question of any considerable importance which has occurred in the criminal courts has been reserved for consideration in it, and its decisions have been reported by a succession of reporters. The total number of volumes of reports published since the court was established in 1848 down to the end of March, 1877, is [1] eight, and something more. These eight volumes contain about 3800 pages, in which are reported about 624 cases. Of these cases only 132 have been reported since 1865, when the new system of law reporting was established, so that the decisions for the last twelve years have averaged just eleven a year; from 1848 to 1865 they averaged close upon twenty-nine a year. The Nisi Prius rulings reported (often in a very unsatisfactory way) in Cox's Criminal Cases are not

[1] *Viz.*

Dennison's Crown Cases	2 vols.
Dearsly	1 vol.
Dearsly & Bell	1 „
Bell	1 „
Leigh & Cave	1 „
Law Reports, Crown Cases Reserved ...	2 vols.
Law Reports, Crown Cases Reserved, in Queen's Bench Division	part of a volume.

The first 390 pages of 1 Dennison report decisions given by the judges before the Court for Crown Cases Reserved was established. The number of cases and pages given in the text is only approximate, but it is not far wrong.

very numerous. Three 8vo. volumes contain the reports for 1861-1874, and a large proportion of them are of little value. I think, indeed, that it is matter of regret that decisions, necessarily given with little consideration, and under great pressure, should be reported at all. [1] On the other hand, the number of persons committed for trial in the fifteen years, 1861–1875, was 268,952, or, on an average, 17,930 a year. The number of persons convicted was 201,603, or, on an average, 13,440 a year. It is thus obvious that, however confused the arrangement of the Criminal Law may be, its substance is so well ascertained, that less than one case in a thousand gives rise to any serious legal difficulty; and the figures given above show that the number of arguable points has greatly diminished since the Court for Crown Cases Reserved was established. If it were worth while to go into the matter more minutely, I could show that year by year the number of cases decided diminishes. The law may thus be regarded as ripe for codification, and this is one of the circumstances which have led me to feel that it is possible to reduce it to a short and systematic form.

The extraction of principles from decided cases forms only one branch of the process of making a digest of the law. It is necessary, in addition, to perform a similar operation upon the statutes. About one half of the criminal law is contained in different statutory enactments, and half of this half is comprised in what are known as the Consolidation Acts of 1861. These collectively form the nearest approach that exists in English law to a penal code. They are five in number, namely,—

24 & 25 Vict. c. 96 (Larceny);
c. 97 (Malicious Mischief);
c. 98 (Forgery);
c. 99 (Coinage);
c. 100 (Offences against the Person).

These Acts contain definitions of all the offences which

[1] These figures are taken from 'The Statesman's Yearbook' for 1877, p. 244.

can be committed against individuals, if offences connected with the coin are regarded (as I think they should be) as constituting private frauds, and not as constituting offences against the Government.

The Acts (of which the history may be seen in Mr. Greaves' preface to his edition of them) form the net result of the labours of two sets of commissions to inquire into and report upon the Criminal Law, which sate from 1833 to 1849, and again from 1854 (I think) till 1861, when the Consolidation Acts were passed. There can be no doubt that they have been of the greatest possible service to the administration of justice, and have proved to demonstration the possibility and advantage of measures of greater extent and completeness. They consolidate all the statutory provisions upon the different subjects to which they relate so effectually, that in the sixteen years which have passed since they were enacted less than thirty[1] decisions have been given upon their meaning by the Court for Crown Cases Reserved. Even this small number of decisions exaggerates the uncertainty of the law. Many of them relate to questions so minute that no care in drafting could possibly avoid their occurrence. Is this or that peculiar document a warrant or order for the receipt of money? Does a woman "abandon" her new-born child if she packs it up in a basket and sends it to the putative father by railway, labelling the basket "with care, to be delivered immediately"? I think it would be hard to find ten expressions in the Consolidation Acts which have been shown by judicial decisions to be obscure.[2] This must be regarded as conclusive proof of the skill with which the Consolidation Acts were drawn, when we consider that an enormous proportion of all the crimes which have been tried and adjudicated upon during that period were dealt with under their provisions.

[1] I have not thought it worth while to make an exact calculation on this subject, but having looked pretty carefully through the reports, I doubt if twenty such decisions could be referred to.

[2] There are, however, some notable exceptions; see, *e. g.*, Article 345 (*b*), representing 24 & 25 Vict. c. 96, s. 75. I do not, of course, refer to obscure or vague expressions re-enacted from earlier Acts.

At the same time it must, I think, be admitted that in style, in arrangement, and in substance, they are open to much objection.

In the first place, they assume the existence of great bodies of unwritten law. The Act relating to offences against the person assumes the existence of a body of law[1] specifying the cases in which the infliction of death or bodily injury may be justified or excused, and defining murder and manslaughter. The Larceny Act assumes and is based upon the existence of the body of law[2] which contains the definition of theft and embezzlement, and the intricate doctrines connected therewith, and the law as to what things are or are not capable of being stolen. The Forgery Act assumes the existence of an elaborate theory as to what constitutes an intent to defraud and a false document.[3]

In the second place the Acts are Consolidation Acts; that is to say, they are composed of the Acts which were in force when they were passed, re-enacted with very little alteration either in substance or in form. Some of these earlier Acts were so drawn as to require to be explained by judicial decisions, and though in some instances the effect of these decisions has been given in the consolidating enactment, this is by no means always the case.[4] In some instances the original language has been repeated, and the consequence has been that it is still necessary to study and understand the effect of all the decisions which have been given regarding it in earlier times. A striking instance of this is to be found in the section of the Larceny Act which defines the offence of obtaining goods by false pretences. The words of the Act are: "Whoever shall by any false pretence obtain, &c." The meaning of these words, as given by the cases upon the subject, is given in Articles 329-332, and, as may be seen by reference to those articles, fills several pages of

[1] Contained in Chapters XXI. to XXIV., both inclusive, of this work.

[2] Contained in Chapters XXXIII. to XXXVI. of this book, both inclusive.

[3] Stated in Chapter XLIII.

[4] Strong illustrations of this may be found in the law as to abduction, Article 262; obtaining goods by false pretences, Articles 329–332; and embezzlement by clerks and servants, Article 309.

print, which represent three sections of Acts of Parliament, two of which were required to amend or explain the first, and the principles established by a number of cases so great that a highly condensed abstract, or rather note, of them fills sixteen closely printed 8vo. pages in the last edition of Archbold (496–512).

The existence of the unwritten law affects not only the contents, but also the arrangement of the Consolidation Acts. I do not believe that any one who read the Larceny Act without being previously informed of the Common Law relating to theft would derive from his reading any notion whatever, except that it consisted of a confused and apparently irrational series of provisions regarding every kind of theft. "Why," he would naturally ask, "should an Act relating to the law of larceny begin with a series of enactments about larceny of living animals? Why should it be necessary to provide separately for the stealing of horses, the stealing of dogs, birds, and beasts ordinarily kept in confinement, the killing of birds or fish in water belonging or not belonging to a dwelling-house? Why, after spreading this matter over eighteen sections, should it be necessary to devote four sections more to the larceny of written instruments, and then to go on to consider in eight sections the subject of the larceny of things attached to or growing on land?"

The answer to these questions would be found in the theory as to what is and what is not the subject of larceny at Common Law, but no one who read the Act would find in it a single hint at that theory, and the consequence is that the Act fails to convey any information to any one who does not bring to its perusal a considerable amount of technical knowledge.

The Act is also so long that it is hardly possible for any memory to retain its different provisions, even if the reasons for their enactment were made apparent. One reason for its length is that one-half of its provisions relate to the subject of procedure, a subject in itself separate from, though closely connected with, the matter which ought to be contained in a Penal Code.

The style of the Acts is no less unfavourable to those who might wish to derive information from them than their length and their arrangement. Acts of Parliament are formed upon the model of deeds, and both deeds and statutes were originally drawn up under the impression that it was necessary that the whole should form one sentence. It is only by virtue of the provision contained in 13 & 14 Vict. c. 21, s. 2,[1] that a full stop can be introduced into an Act of Parliament at all. The effect of this rule of style has been to cause the sections of an Act of Parliament to consist of single sentences of enormous length, drawn up, not with a view to communicating information easily to the reader, but to preventing a person bent upon doing so from wilfully misunderstanding them. The consequence is that sections of Acts of Parliament frequently form sentences of thirty, forty, or fifty lines in length.

The length of these sentences is only one of the objections to them. They are as ill arranged as they are lengthy. According to the model adopted in the Consolidation Acts of 1861, the definition of the offence is interposed between the nominative case, "Whoever," which stands at the beginning of each section, and the verb, "shall be guilty of felony, and shall be liable, &c." As the definition generally contains qualifications of various kinds, and in many cases long lists of words almost, if not entirely, synonymous, the result is that when the reader has arrived at about the middle of the sentence he has forgotten the beginning of it, and finds himself involved in a multitude of words the grammatical connection of which with each other is often obscure and[2] doubtful, even on the most careful and patient examination. Of course an Act of

[1] "All Acts shall be divided into sections if there be more enactments than one, which sections shall be deemed to be substantive enactments without any introductory words." Before this Act was passed it was considered necessary that the Acts should run: "Whereas . . . Be it enacted . . . And be it enacted . . . And be it enacted," &c., &c., to the end.

[2] Let any one, for instance, read and try to construe 24 & 25 Vict. c. 98, ss. 13-16 (see Article 362), on making or being in possession of forged bank-note paper. Sections 27 and 28 (see Article 361) are still worse.

Parliament is meant to be studied, and not to be skimmed like a newspaper or a novel, and a student will see that many things which look like mere verbiage are really essential to the subject; but precision and explicit statement are so far from being irreconcileable with liveliness and perspicuity of style that they render those qualities doubly important. If you have to state a mass of uninteresting details, and if you wish to make them as little repulsive as possible, the least you can do is to put the nominative case near to the verb, to put the rule first and the exceptions afterwards, and to avoid saying the same thing over more than once when there is no real necessity for doing so. The subject must be dull, but the style may be lively. Each word may add to the sense, and may be put in the right place, whether the subject in hand is Paradise Lost or the Statute of Frauds. If an Act of Parliament were written in the same manner as any other book or pamphlet, not only would the whole framework and arrangement of the sentences be changed, but considerable portions of the matter would be thrown into the form of schedules or foot-notes. There is no real reason why this should not be done. The language of any ordinary composition, a newspaper article, a book upon a common subject, a merchant's or solicitor's letter, may, if necessary, be made quite as explicit as any Act of Parliament, and it is certain that such compositions are usually far more natural and easy to follow than those which parliamentary draftsmen put into the mouth of the legislature. In this Digest I have attempted to give what I may call a literary form to the Acts of Parliament which contain the Criminal Law, and especially to the Consolidation Acts. I have tried to give the precise effect of each enactment in the form which the author of an original work would give to his matter, having regard to the convenience of his reader. I offer the Digest, in short, as a literal translation of the Acts into the language of common life.

I have found it possible to shorten them very greatly, whilst I have preserved, not only their sense, but in almost every instance their very words. Some of the means em-

ployed are familiar to every parliamentary draftsman. In many cases an Act of Parliament may be abridged as readily and as safely as an algebraical formula. "Whoever with intent, &c., builds, agrees to build, causes to be built," &c., is the precise equivalent of "Whoever with intent, &c., builds; Whoever with intent, &c., agrees to build; Whoever with intent, &c., causes to be built," just as $(a + b)^3$ is the equivalent of $a^3 + 3a^2b + 3ab^2 + b^3$. I have made such substitutions wherever I could, but one or two are important enough to be specially noticed. Each section of the Consolidation Acts may, as I have already observed, be stated in the following form: "Whoever" (here follows the definition of the offence) "shall be guilty of felony (or misdemeanor), and being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for life" (or, as the case may be), "or for any term not less than three" (it ought now to be five) "years, or to be imprisoned for any term not exceeding two years with or without hard labour." The formula is varied in a variety of minor particulars, to which I need not refer, but it, or something equivalent to it, occurs in every section of each Act defining an offence.

This form admits of the following abridgments. In every, or in almost every, instance a statement of the maximum punishment to which an offender is liable is all that is really required, inasmuch as the minor punishments are, in nearly every instance, the same. The formula might, therefore, be advantageously replaced by the words "shall be liable to years penal servitude as a maximum punishment." The inconvenience of the length of the sentence may be remedied by the simple expedient of bringing together the nominative case and the verb governed by it, and by introducing full stops where they are wanted.

These changes give the following result:—

"Every one is guilty of felony and is liable on conviction thereof to a maximum punishment of years penal servitude who" (here give the definition of the offence). When this form has been adopted it will be seen that, inas-

much as many offences are visited with the same maximum punishment, the repetition of the formula may be avoided by collecting together all the offences which are liable to the same punishment, and putting them under one heading; thus—

"Every one is guilty of felony and is liable on conviction thereof to a maximum penalty of penal servitude for life who does any of the following things, that is to say—

(*a.*) Administers any poison, &c.

(*b.*) By any means whatever wounds, &c.

(*c.*) Shoots at any person, &c."

and so on.

The result of this mode of arrangement is, first, to give the point of the sentence at once, and, secondly, to save as many perhaps as nineteen or twenty repetitions of a long and wearisome form. It also has the collateral advantage, which is by no means slight, of introducing a rational, or, at all events, intelligible mode of arrangement into the Acts, inasmuch as it puts under one heading all the offences which, for whatever reason, subject the offender to the same maximum punishment. Thus, according to my arrangement, a single article (236) of the Digest comprises all the forms of wounding, &c., which subject the offender to penal servitude for life. They are eleven in number, and each of them corresponds to a separate section of the Offences against the Person Act. Ten needless repetitions are thus saved, and the precise equivalent of eleven sections scattered all over the Offences against the Person Act is given in one article, the title of which (Wounding and Acts endangering Life punishable with Penal Servitude for Life) explains the principle of arrangement. Another artifice, which can hardly be said to abridge the enactments, but which I think renders them much clearer, consists in throwing into foot-notes those parts of each enactment which ought to be treated in that manner. Thus, for instance, in the Act relating to malicious injuries to property, it is enacted in a section (sect. 11) which fills an 8vo. page, that all persons commit felony and are liable to penal servitude for life as a maxi-

mum punishment who being riotously and tumultuously assembled together unlawfully demolish, pull down, or destroy any one of a long list of buildings, public or private, or any machinery or mining plant of certain specified kinds, or who begin to do so. This is the exact equivalent of the whole of the interminable sentence in question with the exception of the list of public and private buildings and machinery which are introduced into the body of the definition, and which I put in the form of a note (Article 74).

By going through the whole of the Acts in this manner I have, I hope, succeeded in giving so much of them as relates to the definition of crimes in much less than half the space which they occupy in the Statute Book, and in a form which I hope contains nothing needlessly repulsive to the reader, although the nature of the subject prevents the matter from being attractive to any one who does not wish seriously to study the law. At the same time, by interweaving the Common Law with the Statute Law, and bringing the two into their proper relation, I have attempted to make the general nature of the system and the plan upon which it is arranged intelligible to any person of ordinary understanding and perseverance who cares to study the subject.

The object with which this work is written is twofold. I hope that, at all events, it will enable all persons interested in the administration of the Criminal Law to acquaint themselves with its provisions; but beyond and apart from that, it is intended to serve as the first step towards the enactment of a Penal Code. Such a code must, of course, consist of the existing Criminal Law of England re-arranged and amended. In order that such a re-arrangement and amendment may take place, it is absolutely necessary, in the first place, to know what the law is. This work expresses my understanding of it, and, assuming that I understand it correctly, I will proceed to say a few words upon the steps which will be necessary for the construction of a Penal Code.

In the first place, I think it is perfectly clear that it would be impossible to enact this Digest, or any other statement of the law as it is, into an Act of Parliament. It may contain

the materials for a Penal Code, but it also contains so much that is obsolete, so many needless technicalities and subtleties, so much that is clumsy, so many needlessly minute and irrational provisions, that if the Digest were enacted into a Code it would be altogether unworthy of the time and the country.

No one, I suppose, would wish to draw from the obscurity in which they are at present buried the laws relating to offences against religion (Chapter XVII.): no one would wish to give new force to the extraordinary provisions of the Act for the prohibition of secret societies (Article 86): no one can read without a feeling between amusement and perplexity the wonderful provisions contained in the chapters introductory to the law of theft, relating to possession, asportation, and the things which are the subject of larceny (Chapters XXXIII. and XXXIV.): no one can regard the provisions which represent the contents of the Consolidation Acts themselves with any degree of satisfaction. It is difficult to imagine anything more clumsy than a system which specifically forbids eight ways of attempting to commit murder, and then goes on to enact in general terms that any one who attempts to commit murder in any other way shall be subject to the same punishment (Article 233). This is merely one out of hundreds of instances of the same intricacy which may be referred to. For instance, in the Forgery Act (Chapter XLIV.) the forgery of an extraordinary number of documents is specifically provided for, and numerous arbitrary distinctions are made between the different punishments which are provided for them. The provisions of that Act and those of the Act relating to malicious injuries to property (Chapter XLVII.) might all be thrown into a very few broad general enactments.

As they stand, the Consolidation Acts faithfully reflect the vagueness of the ancient Common Law, and the minuteness of the Statute Law by which its gaps were gradually filled up. When Sir William Coventry's nose was slit as an act of revenge, an Act (22 & 23 Car. 2, c. 1) was passed which made it felony to slit people's noses. When a band of deer-stealers in Waltham Chase (called the Waltham Blacks, from

their habit of blacking their faces) committed a series of offences against keepers and others, an Act was passed (9 Geo. 1, c. 22) which made it felony to inflict various specified kinds of bodily injury, and it was so drawn as to make it doubtful whether it was not a necessary element of the offence that the offender should have his face blacked, or be otherwise disguised. When, in our own day, a certain number of criminals garotted people in the streets of London, an Act was passed providing that persons who garotted their neighbours should be subject to a punishment not inflicted for other crimes of a similar description. It is in this piecemeal manner that our Statute Law on the subject of crime has grown up, and one of the most important improvements which could be made by a Penal Code would consist in reducing it to some sort of order and system. I do not think that, with a correct Digest of the Criminal Law, the production of a draft Penal Code need be a matter of great time or difficulty. I must, however, observe that even if a draft Penal Code were prepared, it ought not, in my opinion, to be seriously discussed in Parliament until it had been laid for a considerable time before the public. No mere Parliamentary discussion would be sufficient to render such a work as good as it ought to be. Nothing short of prolonged public, and especially prolonged professional, criticism could detect the objections which might be made to such a Code, and suggest the different improvements which might be introduced into it. If such a Code were drawn, and were introduced avowedly in order to attract public attention to the matter, it might, after being subjected to public criticism for a year or two, be brought in with some chance of being accepted or rejected as a whole.

It must, however, be borne in mind that a Penal Code, when complete, would form only part of the Criminal Law. It could hardly be rendered efficient unless it were accompanied or closely followed by a Code of Criminal Procedure. About half of the Consolidation Acts consist, as I have already observed, of provisions relating to this subject. They all have reference to the existing definitions of crimes,

and, indeed, a considerable number of our present definitions of crimes have to be deduced from the old forms of indictment for them. The two subjects can hardly be treated independently, and before any serious effort could be made to introduce a Penal Code it would be necessary to have a Digest of the Law of Criminal Procedure, and a Code of Criminal Procedure founded upon that Digest.

These considerations convince me that it must, under any view of the case, be a work of years to obtain a real codification of the Criminal Law; but, in the meantime, much may be done in the way of amendment, not only of the Law of Crimes and Punishments, but also of the Law of Criminal Procedure, and I am not without hope that the Digest which is now submitted to the public may afford facilities for that operation.

By throwing the whole law into a systematic form, it enables an attentive reader to criticise it as a whole, and to appreciate the character and effect of the amendments which it requires. One of Bentham's heaviest and best founded complaints against the law in general was that it was so intricate and technical that no one but an experienced lawyer could say what would be the effect of any particular alteration proposed in it. This, as he justly observed, made it almost impossible to reform it in any satisfactory way without, as a first step, sweeping it away, so as to obtain a *tabula rasa*. This was for obvious reasons considered to be out of the question, and the result is that the question has, so to speak, hung fire ever since he directed attention to it early in this century. Most of the gross absurdities, and every trace of the cruelty which used to disgrace our law, have been removed, but it is still as intricate and unintelligible as ever.

Assuming the correctness of the statement contained in this book, I will proceed to criticise the component parts of the law in a very general way, and to point out a certain number of amendments which, if made, would not only improve the law, if nothing else were done to it, but would render possible the construction of a Penal Code.

The first part of the Digest, which relates to the law of punishments, represents the result of the prolonged controversies on the punishment of death, on transportation and penal servitude, on prison discipline, on flogging, reformatory schools, and kindred topics which have attracted so much attention of late years. A lawyer's opinion on such subjects is, as such, of no special value. And I shall say nothing on the subject beyond pointing out a few defects in the law which are apparently due to imperfect drafting, ill-advised amendments, or some other accidental cause, and which do not touch the main principles of the subject. The most prominent of these are as follows:—

The punishment of death is now inflicted for treason (Articles 51–61), murder (Article 223), piracy with wounding, &c. (7 Will. 4 & 1 Vict. c. 88, s. 2 (Article 105)), and burning dockyards, &c. (12 Geo. 3, c. 24 (Article 376)). The 31 Vict. c. 24, which enacts that executions are to take place in gaols, refers to executions for murder only. Surely this ought to be extended to all cases.

Upon a conviction for felony the Court may award £100 or less "for any loss of property suffered by any person through or by means of such felony" (33 & 34 Vict. c. 23, s. 4 (Article 16 (*b*)). Why not allow of compensation for injuries to the person as well? Would it not be better still to enact (possibly with a few special reservations as to offences like libel) that whenever any person was tried for any crime, any one injured by it might claim damages and prove the amount after the prisoner's conviction, before the jury which had convicted him?

The provisions as to punishments for felony after a previous conviction of felony (7 & 8 Geo. 4, c. 28, s. 11, the various Acts relating to penal servitude, and the 24 & 25 Vict. c. 96, s. 7 (as to larceny)) have come to be very confused, and are not, I think, altogether consistent (see Articles 19 and 32). I doubt whether, by the letter of the law, a man might not be sentenced on a second conviction for simple larceny to be kept in penal servitude for life and to be thrice publicly whipped. These sections might be advan-

tageously repealed, and re-enacted in a simple form and according to their real meaning.

The 9 & 10 Vict. c. 24, s. 1, was intended to do away with minimum punishments, but it is so worded as not to effect that purpose completely. Its words are, "in all cases where the Court is now (June 1846) by law empowered or required to award a sentence of transportation exceeding seven years" it may pass instead a less sentence. The words "exceeding seven years" should be struck out. There are several statutes (*e.g.*, 37 Geo. 3, c. 123, as to unlawful oaths (Article 84)) which require a sentence of seven years transportation to be passed. In those cases the Court would be bound to pass an equivalent sentence of penal servitude, and would have no power to pass a sentence of imprisonment. There are also still a few statutes requiring a fixed term of imprisonment to be awarded (*e.g.*, 9 Will. 3, c. 35 (Article 163)). The Act ought to be made general, and to give power to pass minor sentences in all cases whatever. The offence specified in Article 168 is the only one in which a minimum punishment has been deliberately sanctioned of late years. I should not propose to interfere with it.

It might be worth while to enact that no one should be sentenced to whipping except under the provisions of an Act of Parliament. The power of sentencing a person to be whipped for a misdemeanor at common law has never been formally taken away, and, I suppose, still exists, though it must be very many years since it was exercised.

The general classification of crimes, as treason, felony, and misdemeanor, is extremely inconvenient and capricious. The severest of secondary punishments (imprisonment for life and forfeiture of goods) is inflicted for the misdemeanor of misprision of treason. The misdemeanor of conspiring to murder subjects an offender to ten years penal servitude, and many misdemeanors are punishable by penal servitude for seven years. All common misdemeanors are put by statute upon the same footing as felonies in regard to the summary arrest of the offender (see, *e.g.*, the Larceny Act, 24 & 25 Vict. c. 96, s. 103), and this removes the only sub-

stantial distinction between the two classes of offences. It would be difficult, though perhaps not impossible, to remedy this defect by a mere amending Act. If the law were codified, it would be easy to remove the distinction by enacting that all crimes should henceforth be of the same nature, and by annexing a schedule to the Code of Criminal Procedure showing in what cases a summary power of arrest should be permitted. The Indian Code of Criminal Procedure contains a schedule which shows how appearance is to be compelled, and whether or not bail is, as a rule, to be taken, in regard to every offence defined by the Penal Code.

Chapter II., entitled "General Exceptions," intentionally omits an examination of certain legal doctrines, too vague to be thrown into the form of propositions, the consideration of which I reserve for the new edition of my General View of the Criminal Law. I have said nothing as to the doctrine of intention, as to the sense of the word "malice," or as to the maxim, "*Non est reus nisi meus sit rea.*" These topics will find a more appropriate place in a commentary on the law than in the statement of the law itself, but I may make one or two remarks on the rules which are included in that chapter.

The law relating to insanity (Article 27) is often said to be in an unsatisfactory state, and I think that this is true to some extent, but only in a very restricted sense. The theory of the law is plain enough. Certain mental elements —will, knowledge, intention—are essential to criminality. Prove their absence and criminality is disproved. The difficulty is, that medical science does not enable us to say how this theory is related to facts. If medical men could tell lawyers precisely how A's mind was affected in relation to a particular act by the mental disease under which A was labouring when he did that act, the lawyer could tell whether or not the act was a crime; but this is just what medical men cannot tell. Generally they can only say that A did in fact labour under a particular disease with the nature of which they are very imperfectly acquainted, but how that disease may have been related to any particular action of A's in

most instances they cannot tell at all. The law can hardly be improved till medical knowledge on the subject has made great advances.

The rule (Article 30) which raises a presumption that a married woman committing a crime in her husband's presence acts under his coercion, and that that coercion excuses her, is an anomaly which, as I believe, originated in the wish to give some women a sort of rough equivalent for the benefit of clergy from which they were excluded till the reign of Queen Anne (see Note II. in the Appendix). It seems to me monstrous that if a husband and wife of mature age, and their daughter of, say, eighteen, commit a theft together, the wife should be presumed to act under the husband's coercion and should be excused by it, whereas direct proof that the daughter acted under the most stringent coercion from her parents is no excuse at all. The present law never works anything but injustice, and not much even of that. I think it ought to be repealed simply. An additional reason for doing away with it is that it is very uncertain upon the cases and authorities how far the rule extends.

The law relating to principal and accessory (Chapter IV.) seems to me to have become altogether obsolete. The old law was (shortly) that there were no accessories in treason, because of the extreme gravity of the crime, and none in misdemeanor, because it was not worth while in misdemeanors to draw the distinction. The distinction was thus reserved for cases of felony—that is to say, for capital cases as to which it was thought desirable to temper the excessive cruelty of the law by the uncertainty of its execution. The subtleties connected with the subject have been for the most part removed, and I do not see why the phraseology should be retained. As I understand the matter, Article 44 gives the effect of 24 & 25 Vict. c. 94; and if I am right in this supposition, it would be easy by a general enactment to banish the words "accessory before the fact" and "principal in the second degree" from the Criminal Law, and so to suppress a totally useless and rather difficult part of it.

Part II. relates to offences against public order. The law relating to high treason (Articles 51–61) is in a strangely intricate and technical state. I have expressed it simply, and I hope correctly. I do not think the judicial constructions put upon some of the branches of 25 Edw. 3, by the judges add much to the security or stability of the Government. No jury would be likely in these days to find a man guilty of a constructive intent to kill the Queen, or of a constructive levying of war. Nor, since the passing of 11 Vict. c. 12 (Article 62), is it likely that any jury would be asked to do so. I do not think there would be any real difficulty in recasting the law in a rational form, but the subject is one on which people's feelings might easily become excited, and though happily the practical importance of the subject is, and is likely to continue to be, small, excited discussions, which might leave the law in an even less satisfactory state than it is in at present, might be a greater evil than the continuance of a state of the law which, if clumsy, has, at all events, the cardinal merit of being efficient.

Chapter VII., which relates to violent breaches of the peace, calls for little remark; I may observe, in passing, that an error of some sort has crept into the drafting of 39 & 40 Vict. c. 36, ss. 188-9, which punishes unlawful assemblies for smuggling purposes. I have explained it in a note to Article 76. Some of the provisions as to unlawful petitioning seem to be obsolete. The maintenance of 57 Geo. 3, c. 19, s. 23 (Article 80), appears to me to answer no other purpose than that of giving disorderly people an opportunity of displaying a little cheap courage and safe disregard for the law by holding public meetings in Trafalgar Square whilst Parliament is sitting. The singular provision contained in Article 81 obviously exists only because it is forgotten.

Chapter VIII. relates to unlawful oaths and associations. The Secret Societies Acts (39 Geo. 3, c. 79, and 57 Geo. 3, c. 19 (Article 86)) are full of provisions quite unsuited to these times and liable to great abuse; and the provisions of the Catholic Emancipation Act (10 Geo. 4, c. 7, ss. 28, 29

(Article 90)) about Jesuits and monks, are habitually set at nought. The law as to seditious words, libels, and conspiracies (Articles 91, 92) has not been put in force for many years; but it might, of course, be necessary to enforce it, and I do not think it is in itself unreasonable.

Chapter IX., which relates to offences against foreign powers, contains one provision (Article 98) which is clearly monstrous and might as well be repealed, the offence being left to be punished as an ordinary misdemeanor. The Foreign Enlistment Act (Articles 100–103), which makes up the bulk of the chapter, has been so lately fully considered, and was drawn with so much care, that no remark arises upon it, except that it admits of a little abridgment, which would be an advantage in a Penal Code.

Chapter X. deals with offences committed on the high seas, namely, piracy and slave-trading. The law relating to piracy is founded partly on the law of nations (Article 104), which, so far as I know, does not define the offence of piracy with any sort of precision, and partly on statutes (Articles 106–112) passed in the early part of the eighteenth century, which are a monument of the proportions which highway robbery on the sea had attained at that time. The Act which punishes slave-trading is exceedingly elaborate, and I think no one could understand it without a degree of study which would never be bestowed on it, except for some special purpose. I think it will be found that Articles 113–117 are the precise equivalent of it.

Of the offences defined in Part III. (abuses and obstructions of public authority) I have little to say. Most of them are common law offences of rare occurrence, but some statutory offences relating to parliamentary and municipal bribery are included in Chapter XIII. The statutes are modern and drawn with much care and precision, and do not appear to require any amendment.

The offence of perjury, which is defined in Chapter XIV., is treated in a very unsatisfactory way by the existing criminal law. I have given some account of the subject in Note VII., pointing out various matters which have not

found their way, at all events, into the common text books. The Indian Penal Code punishes, not perjury, but the offence of giving false evidence, which, I think, is the true way of dealing with the subject, as the real subject of punishment is misleading the Court, and not the impiety of breaking an oath. I think the solemnity of an oath would be rather increased than otherwise by treating it as a solemn conscientious sanction, superadded to but independent of the temporal sanction for giving false evidence. But be this as it may, three alterations in the existing law appear to be urgently required.

First, perjury, or giving false evidence, with intent to obtain property, or with intent to procure the conviction of a person for an offence punishable with death or penal servitude, ought to be punishable with penal servitude for life. It is a crime infinitely more odious and dangerous than robbery, and may be made the instrument of a crime morally equivalent to murder in its most horrible form.

Secondly, the law which requires the false matter to be "material to the question depending in the proceeding" in which perjury is committed ought to be repealed. It arose, as I think I have shown in Note VII., out of a mere blunder of Lord Coke's, and has now been nearly explained away by *R.* v. *Gibbon*, L. & C. 109, and other cases. Surely, the plain sense of the matter is that if a man gives evidence in a court of justice he is bound to tell the truth, not merely upon material points, but upon every point on which he is questioned.

Thirdly, each separate false assertion should constitute a distinct offence. When a man invents an odious calumny on an innocent lady in order to back up a monstrous lie as to his own identity, common sense would say that he commits two distinct crimes. As the law now stands, he only supplies matter for two assignments of perjury in relation to the one offence of breaking one oath.

I think that the offences of champerty, maintenance, and being a common barrator (Article 141) ought to be abolished for the reasons given by the Criminal Law Commissioners in

their 5th Report, p. 39. It might be provided that this should not affect the validity of any contract involving champerty or maintenance.

At all events, the statute 12 Geo. 1, c. 29, s. 4 (Article 141, last paragraph), ought to be repealed. This Act (which has been forgotten) is, perhaps, the most iniquitous in the statute book. It provides, that if any person practises as a solicitor or agent in any suit or action after having been convicted of forgery, perjury, or common barratry, he may be sentenced to seven years transportation "upon an order to be made by the judge of the court in which the suit was brought, who shall, upon complaint or information, examine the matter in a summary way in open court."

The law relating to escapes and rescues (Chapter XV.) is in an intricate state, but nothing except a complete re-enactment and re-casting of it would be worth doing.

Part IV. relates to offences consisting of acts injurious to the public at large.

Chapter XVI. (undefined misdemeanors) puts, I think for the first time, into a distinct shape the claim (if I may call it so) which courts of justice have virtually made, by many of their decisions, to a sort of qualified legislative power, for the purpose (to use the words of Pollock, C.B.), of "repressing what is a public evil and preventing what would become a public mischief." If I had omitted this chapter I should not, I think, have given a faithful representation of the law as it is, but I am, of course, aware that its insertion may give rise to controversy. I believe, however, that what I have stated is strictly true, and that the chapter represents the most important part of what has been often described with approbation as the "elasticity" of the Common Law. I might have given many other illustrations of the exercise of this quasi-legislative power by the judges besides those which I have mentioned.

Chapter XVII., which relates to offences against religion, and Article 170, which relates to ecclesiastical censures for immorality, will probably be read with surprise by many persons. The whole of this law is practically obsolete, and

might be repealed with advantage, though, of course, not in such a way as to diminish the ecclesiastical obligations of the clergy of the Church of England. As to blasphemy at Common Law, it would, perhaps, answer all practical purposes if the right to institute prosecutions for the offence were to be confined to the Attorney-General. Such a provision would render the definition of the offence comparatively unimportant. My own personal opinion is that blasphemy (except in the form of cursing and swearing, and the use of profane language in public places) ought not to be made the subject of temporal punishment at all, though, of course, if it tended to produce a breach of the peace it might be dealt with on that ground. The statute 9 & 10 Wm. 3, c. 35 (Article 163), has never, I believe, been enforced, and is obviously unsuited for these times.

I have no particular remark to make on the laws relating to disorderly houses, public nuisances, and vagrancy, except that it seems singular to employ the criminal law for the purpose of testing the liability of a parish to repair a highway, or the right of a particular person to erect a telegraph pole by the side of a road. I do not know, however, that this involves any particular inconvenience, except in respect of some slight differences between civil and criminal procedure, and the rules of evidence as applicable to them.

Parts V. and VI. of the Digest contain, as I have said already, the provisions of the Consolidation Acts and those branches of the Common Law which are necessary to be known in order to understand them. The composition of the introductory chapters (Chapters XXI. and XXII., and XXXIII.–XXXVI.), which contain the common law upon these subjects, has been by far the most difficult part of this work. As to Chapters XXI. and XXII., I do not know that any attempt has been made by any previous English writer to collect the principles of the law upon the subject of the infliction of death or bodily injury into a single connected whole. I have spared neither thought nor labour in the effort to make my statement of the law complete and correct. This is not the place to explain the nature of the

difficulties with which I have had to contend, nor the manner in which I have dealt with them. I may, however, observe in general, that though the law appears to me to be in the main not unreasonable, it is so fragmentary and has to be collected from so many different sources, that I am by no means sure that I have succeeded in my undertaking. Part of it bears the traces of a state of manners which has long since passed away, and seems cumbrous and obscure. It is expressed in Article 200 relating to private defence. It ought to be simplified if the law were codified; indeed, it seems, as it is, to be half obsolete.

The definition of homicide is, I think, reasonable, except in so far as the definition of a human being may be considered to err on the side of mercy. Physically, I suppose, a child ought to be regarded as a human being as soon as it has an independent circulation at latest. Probably the wish to avoid convictions for infanticide has led to the establishment of the definition given in Article 218.

The rules in Article 221 seem to be irrational, with the exception of the last, which is that causing death by perjury in a court of justice is not murder. I think this (if indeed it is the law) is right, because the offence lies in the perjury and the intent by which it is accompanied, and not in the result produced. A man executed after false evidence had been given to secure his conviction might be guilty of the crime charged against him. Besides, if the offence were treated as murder, it would be impossible to prove the commission of the offence without examining both the judge and the jury who tried the first case as to the effect produced on them by the perjured evidence. Moreover, it seems incongruous to treat a legal execution as being in any sense of the word a murder by any person. I think, however, that the fact that no special punishment is provided for so atrocious a crime is a blot on the law, and, as I have already said, I would punish it with the utmost severity. I do not myself think that death would be too severe a punishment for perjury in a capital case coupled with an intent to procure the prisoner's conviction.

The definitions of manslaughter and murder (Article 223)

are, I hope, correct. They have cost me untold trouble, as may be seen by reference to Notes XIII. and XIV. They show, I think, that the law is very nearly reasonable, and might be made quite reasonable by a slight amendment, to the effect that homicide should not be deemed to be murder only because the act causing death was accompanied by an intent to commit a felony or to resist an officer of justice in the execution of his duty. It is a question of minor importance whether causing death accidentally by an unlawful act, *i.e.*, causing death by an unlawful act not intended, and not likely to cause either death or grievous bodily harm to the person killed, ought to be a crime in any case. If a man is intentionally killed under a mistake, or accidentally killed by an act recklessly done which puts him in danger, it is of course another matter. If A shot at B supposing B to be C, and killed B, this ought, no doubt, to be murder, because A clearly intended to kill the man at whom he shot. His opinion, that the man at whom he shot was C and not B, was his motive for shooting at that man, but did not affect his intention. Again, A shoots at B with intent to murder B. C, who is standing by, is killed. This, too, ought to be murder, because if you shoot at one of two men standing together you are likely to kill the other; but suppose the gun had burst and killed C when standing at a distance from B? In this case it seems to me that the offence committed is not the murder of C (whose death is a mere accident), but the attempt to murder B.

The crime of manslaughter might, I think, be properly subdivided into three different offences punishable with different degrees of severity. That is to say, manslaughter, which but for provocation would have been murder, which might subject the offender to penal servitude for life as a maximum. Manslaughter by the intentional infliction of bodily harm neither likely nor intended to kill, which might be called by some such name as killing by a common assault, and manslaughter by negligence, which might be called killing by negligence. As matters stand, a surveyor who causes the death of a man by leaving dirt on the road which

upsets his carriage, commits the same offence and is liable to the same punishment as a man who returns a blow by a stab with a knife or a shot from a pistol.

I have little to say which need be said here as to the particular crimes against the person contained in the 24 & 25 Vict. c. 100 (Chapters XXV.–XXIX.) They are, as it seems to me, defined with excessive minuteness, and might be greatly simplified if a Penal Code were drawn. I have pointed out in the foot-notes one or two defects in the law. I may add to them the observation that it seems singular that no negligent acts causing, not death, but injury or danger to life or limb, should be punishable except acts endangering railway passengers and furious driving (Article 240). Negligence in regard to machinery connected with mines and manufactures, or in regard to explosive substances, is at least equally dangerous and blameable.

The law as to rape is not in a satisfactory state. The definition of the crime given in Article 254, is founded upon a variety of cases which had produced a definite, though not a completely satisfactory, result. Very lately a case has been decided which throws the whole subject into confusion. This is *R.* v. *Flattery*, in which it was held by the Court for Crown Cases Reserved that a man who persuaded a girl to allow him to have connection with her by pretending that it would be of use to her medically or surgically was guilty of rape. This appears to be directly opposed to no less than five cases in which it had been held that it is not rape to obtain connection with a married woman by personating her husband. The Court, indeed, announced their intention, as I am informed, to reconsider these cases if the occasion should arise.

The natural indignation which such abominable acts produce tends to justify this decision, but I think it is to be regretted, because it is difficult to see how far the principle ought to extend.

If it be said that a consent obtained by fraud is no consent, where is the doctrine to stop? Is seduction under a promise of marriage, or bigamy, the woman believing the

man to be unmarried, to be regarded as rape? Such a doctrine will surely involve an objectionable legal fiction.

I think the difficulty might be met by a statutory enactment punishing with the same severity as rape the offence of personating a husband, or obtaining a woman's consent to connection on the pretence of medical or surgical treatment. It is difficult to imagine any other kind of fraud by which such a purpose could be effected other than the frauds which usually accompany seduction. As to bigamy, I have always thought that it is at present punishable far too lightly in cases in which the woman is deceived. In such a case the pretended husband has inflicted an injury as cruel and heartless as rape, and he ought to be punished accordingly.

I may draw attention here to a strange mistake in the drafting of 38 & 39 Vict. c. 94, s. 3. See Article 256 and note.

The law relating to theft and cognate offences is in a state of excessive intricacy and technicality on account of the faulty definition of theft, and of the antiquated doctrines as to the things which are the subject-matter of larceny by which its form is determined. It could not be put into a completely satisfactory state without being entirely recast on the principle of making the fraudulent conversion, and not the fraudulent taking, the offence. If this were done it would be well to consider whether the law ought not to be made far more severe as against mercantile and other frauds and breaches of trust than it is at present. I cannot here discuss this important subject; but Article 304 and the other articles to which it refers show how imperfect the law is as it stands at present. It is enough for my present purpose to observe that the most glaring defects of the law might be removed by sufficiently simple amendments, which might be made at once. An unprofessional reader would hardly believe how much the law would be simplified in practice by an enactment that embezzlement and obtaining goods by false pretences should be and be treated as theft for all intents and purposes. Embezzlement is already declared to be theft by 24 & 25 Vict. c. 96, ss. 68, 70 (Articles 297, 309), but the practice of drawing an indictment as for a distinct

offence has become so inveterate that it has been provided by statute (24 & 25 Vict. c. 96, s. 72) that a person indicted for embezzlement may be convicted of larceny, and that a person indicted for larceny may be convicted of embezzlement if upon their trials they appear to have committed those offences. Section 88 of the same Act provides, as to the offence of obtaining goods by false pretences, that an offender shall not be acquitted if it turns out that he committed larceny. It has, however, never been provided that if it turns out that a man charged with theft really obtained the goods by false pretences he can be convicted of that offence.

The effect of these provisions is that the question whether an offence is larceny, embezzlement, or false pretences must still be decided, and that if the decision is wrong justice will be defeated. If a judge or chairman directs a jury to convict of embezzlement, if they convict at all, when in fact the man has committed theft, or if he is indicted for larceny when he ought to have been indicted for obtaining goods by false pretences, the conviction is quashed.

A very large proportion of the questions which come before the Court for Crown Cases Reserved turn upon the distinctions between these three offences, which are really distinctions without a difference, and the whole, or nearly the whole, learning of possession turns upon the distinction between theft and embezzlement. Besides this, indictments for obtaining goods by false pretences are extremely long and intricate, and in many cases miscarriages of justice have occurred from a defect in the statement or proof of the false pretence by which the goods, &c., were obtained. If the distinction was entirely removed, as it would be by the course I suggest, a great mass of cases and much useless nicety and intricacy might be forgotten.

This, however, is only one of the sources of intricacy in the law of theft. Another, which I think has caused almost as much confusion, is to be found in the state of the law as to the things which form the subject of larceny (Chapter XXXIV.). It is as it stands in the absurd state of a series of broad antiquated rules qualified by exceptions almost

co-extensive with those rules. The rules and exceptions are as follows:—

1. *Common Law Rule* (Article 291). Living wild animals cannot be stolen.

Statutory Exception (Articles 385, 386). Except, in a sense, deer, and, more or less, hares and rabbits (24 & 25 Vict. c. 96, ss. 11–17, and see 9 Geo. 4, c. 69, and 1 & 2 Will. 4, c. 32, as to game).

2. *Common Law Rule* (Article 290). Domestic animals cannot be stolen nor wild animals kept in confinement for curiosity, like bears and monkeys, for "they are not worthy that a man should die for them," unless, indeed, they are hawks, used for the "solatium vitæ" of princes and nobles. Moreover, animals of "a base nature" cannot be stolen.

Statutory Exception (Article 328 (*a*)–(*e*)). Dogs may be stolen, also all domestic animals, also all animals usually kept in confinement (24 & 25 Vict. c. 96, ss. 18–22).

Here the exception very nearly blots out the rule, though I think it would still be difficult to say whether ferrets or rats are capable of being stolen or not.

3. *Common Law Rule* (Article 288). No chose in action can be stolen.

Statutory Exception (Article 323). By 24 & 25 Vict. c. 96, s. 27, any one who steals any valuable security, except a document of title to land, is guilty of the same felony as if he had stolen the thing for which it is a security.

I regard the Common Law rule as intrinsically the most absurd principle still influencing the law. It is in short this:—We will make it legally impossible to steal the evidence of a right, although it is physically possible to do so, because it is physically impossible to steal the right itself. This overlooks the obvious truth, that if it were physically possible to steal a right there would be no reason why rights should not be the subject of larceny.

This absurdity is still the law of the land, although it has been rendered practically almost innocuous by the exception.

The exception, however, leaves the Common Law principle in force, and it occasionally works injustice. For instance,

in *R.* v. *Watts* (Dear. 326) it was held that an unstamped building agreement could not be stolen. It has been held that a pawnbroker's ticket (*R.* v. *Morrison*, Bell, 158), and a railway ticket (*R.* v. *Boulton*, 1 Den. 508), can be stolen, but the principle upon which these decisions proceed is by no means clear.

4. *Common Law Rule* (Article 287). Land, and things fixed thereto, or growing therefrom, and documents of title, cannot be stolen.

Statutory Exception (Articles 327, 328). By 24 & 25 Vict. c. 96 (s. 28), documents of title to land, (31), fixtures (32–38), all trees, vegetables, shrubs, &c., living or dead, except only shrubs, &c., under the value of 1*s.*, and all minerals, are the subject of larceny. The exception here blots out the rule, except as to shrubs, &c., under the value of 1*s.*

The result is substantially, that all the Common Law rules have been repealed by statutory exceptions nearly, but not quite, co-extensive with them.

The great and unmeaning intricacy of this arrangement is a considerable evil, the quibbles to which it occasionally gives rise are also evils, and there is a third evil which is not the less serious because it is little known. It has been held on several occasions that the distinction between what is the subject of larceny at Common Law and by Statute must be borne in mind in interpreting the statutes. Thus, for instance, it was decided in a late case that the words "by any false pretence obtains from any person any chattel, money, or valuable security" includes only chattels which were the subject of larceny at Common Law, and that therefore a man who obtained by false pretences two pointers worth £5 each committed no offence (*R.* v. *Robinson*, Bell, 34).

According to this case a man might obtain by false pretences any amount of growing timber, coal in a mine, or valuable fixtures without committing any offence at all. To take the commonest and vulgarest illustration, a thief finding out that repairs are going on in a house, pretends to be the plumber's man, and so gets leave to carry off leaden pipes, which he sells to a receiver of stolen goods as old lead;

another, by some analogous fraud, gets leave to dig up a bed of growing potatoes, or to remove a number of valuable plants from a nursery garden; these acts are not offences according to *R.* v. *Robinson.* Cases of this kind disgrace the law, and lead those who accidentally become aware of them to suppose that such cases are far more common than they really are, and to overlook the real merits of the system, just as one act of gross rudeness or fraud will do a man's character more harm than years of good behaviour will efface.

There is one branch of the law on this subject which I would not interfere with on account of the delicacy of the questions with which it is connected, I mean the law relating to living wild animals, the most important branch of which is the law relating to game. This branch of the subject I would leave just as it is, the rest I would deal with by abolishing once for all the Common Law principles, instead of making exceptions to them. Such a step would leave the penal part of the law unaltered; it would take out of it a vicious principle, which has caused great confusion, and it would render it possible in drawing a Penal Code to dispense altogether with more than ten sections of the Larceny Act, which answer no other purpose than that of partially removing the confusion.

The law as to larceny by bailees used to be exceedingly absurd. A conversion by a bailee was not larceny unless before converting the property the bailee did some act determining the bailment. This has been reduced to a rational state for the most part by 24 & 25 Vict. c. 96, s. 3 (Article 300). But the strange proviso, "this section shall not extend to any offence punishable on summary conviction," at the end of the section, ought, I think, to be repealed. It did not occur in the original Act, 20 & 21 Vict. c. 54, s. 4, but was added in the Act of 1861, according to Mr. Greaves "to prevent the clause applying to the class of persons employed in the silk, woollen, or other manufactures liable to be summarily convicted under sundry statutes." It seems to me that this is open to several remarks.

First, if the section would have repealed the Acts in

question but for the proviso the mischief was already done when it was passed, for the 20 & 21 Vict. c. 54, s. 4, was in precisely similar terms, except that it did not contain the proviso. It therefore repealed whatever was capable of being so repealed.

Next, the Acts in question are Acts which subject to penalties workmen "purloining" (the word "stealing" was obviously avoided on account of the old rule as to larceny by a bailee) materials entrusted to them by their employers.

As these statutes were rendered necessary by a defect in the old law, why should they be maintained when that defect is removed? If it is said because the Acts in question provide for a summary procedure, which is convenient, the answer is that the Criminal Justice Act (18 & 19 Vict. c. 126) has provided a summary jurisdiction for all cases of petty theft. I do not see why a working tailor who steals a bit of cloth from his master should be dealt with in any other way than any other petty thief.

Thirdly, judging from the Acts mentioned in the index to the Revised Statutes on this subject, I should think that most of the enactments referred to had been already merged (if such a process is possible) in the statutes relating to embezzlement. At all events the proper course would seem to be to declare expressly that the summary penalties intended to be retained should be retained, for the proviso, as it stands, certainly raises a doubt whether, if a messenger was brought before a magistrate charged with stealing a parcel entrusted to him of less value than 5*s.*, and if it appeared that he had stolen it without doing any act to determine the bailment, the magistrate ought not to dismiss him.

Upon the law as to forgery, coining, and malicious mischief (Chapters XLIV., XLVI., XLVII.), I have nothing to say which need be said at present. All those Acts would admit of very great abridgment and condensation, if they were redrawn as chapters in a Penal Code. They subdivide the different offences, and distinguish between the punishment allotted to substantially identical offences in a manner

which makes them very long and intricate, but they are not perplexed by any of the unreasonable Common Law principles which introduce so much confusion into other parts of the law, and they have been most carefully drawn.

The law relating to offences connected with restraints of trade and the breach of particular duties created by contract (Chapter XLIX.), is so modern, and has been in some cases the subject of such vehement and such very recent controversy, that no one would think of re-opening the discussions connected with it from the point of view of a mere lawyer. I may, however, observe that 38 & 39 Vict. c. 86, s. 7, clause 1 (the Conspiracy and Protection of Property Act, 1875), has introduced into the law of England an offence of an entirely new character, and of the greatest possible importance, unless, indeed, it is to be restricted by the reference to the general purport of the Act to the case of masters and servants. The enactment in question makes it a misdemeanor to intimidate any person or his wife or children (? child), with a view to compel him to abstain from doing or to do any act which he has a legal right to do, or abstain from doing, wrongfully and without legal authority.

The enactment seems to have been taken from section 503 of the Indian Penal Code, which punishes criminal intimidation. I suppose, however, it would be construed in connection with the other provisions of the Act. It can hardly have been the intention of Parliament to provide that if a father tells his grown-up daughter that if she marries A B he will never speak to her again, and disinherit her, he is to be liable to £20 fine and three months hard labour.

If these observations should have the effect of drawing the attention of the Government or of Parliament to the subject to which they relate, it would be an easy matter to throw them into the form of a bill for amending the Criminal Law, and if such a bill were passed, it would be a long step towards a Penal Code.

The amendments required in the law of Criminal Procedure are far more numerous, and would go far deeper than those which are required in the law defining crimes and

punishments. I cannot, however, enter upon this subject, until I am able to bring out (as I hope to do in the course of the year) a Digest of the Law of Criminal Procedure.

In conclusion, I have to express the obligation under which I am to my friend Mr. Horace Smith (of the Midland Circuit), the editor of the last edition of Roscoe's Criminal Evidence, for much valuable assistance in the preparation of this work, and especially for the Index to it.

J. F. S.

4, Paper Buildings, Temple.
April, 1877.

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LIST OF ABBREVIATIONS.

A. & E. . .	Adolphus & Ellis.
B. & A. . .	Barnewall & Alderson.
B. & Ad. . .	Barnewall & Adolphus.
B. & B. . .	Broderip & Bingham.
B. & C. . .	Barnewall & Cresswell.
Bell, C. C.. .	Bell's Crown Cases.
Brooke's Abt .	Brooke's Abridgement.
Burr. . .	Burrow's Reports.
Cald. . .	Caldecott's Settlement Cases.
Camp. . .	Campbell's Reports.
Car. & Mar. .	Carrington & Marshman.
Ch. D. . .	Chancery Division.
C. & K. . .	Carrington & Kirwan.
Cl. & F. . .	Clark & Finnelly.
Cox, C. C.. .	Cox's Criminal Cases.
C. & P. . .	Carrington & Payne.
C. P. D. . .	Common Pleas Division.
D. & B. . .	Dearsly & Bell.
Dear. . .	Dearsly.
Den. . .	Dennison's Crown Cases.
Doug. . .	Douglas.
Ea. . . .	East's Reports.
East, P. C. .	East's Pleas of the Crown.
E. & B. . .	Ellis & Blackburn.
Esp. . .	Espinasse.
Ex. D. . .	Exchequer Division.
F. & F. . .	Foster & Finlason.
Foster . .	Foster's Crown Cases.
Gen. View Cr. L.	Stephen's General View of the Criminal Law.
Hale, P. C. .	Hale's Pleas of the Crown.
Hawk. P. C. .	Hawkins's Pleas of the Crown (Curwood's edition).

Kel. . .	Kelyng.
L. & C. . .	Leigh & Cave.
Lew. . .	Lewin's Crown Cases.
L. J. (M.C.) .	Law Journal, Magistrates Cases.
L. J. (Q.B.) .	Law Journal, Queen's Bench.
L. R. C. C. R. .	Law Reports, Crown Cases Reserved.
L. R. H. L. .	Law Reports, House of Lords.
L. R. P. C. .	Law Reports, Privy Council.
L. T. (N.S.) .	Law Times, New Series.
Mod. . .	Modern Reports.
Moo. . .	Moody's Crown Cases.
Moo. & Ro. .	Moody & Robinson.
M. & S. . .	Maule & Selwyn.
P. D. . .	Probate Division.
Q. B. . .	Queen's Bench Reports.
Q. B. D. . .	Queen's Bench Division.
Rep. C. L. C. .	Report of the Criminal Law Commission.
W. Rob. . .	W. Robinson's Admiralty Reports.
R. & M. . .	Ryan & Moody.
Roscoe, Cr. Ev. .	Roscoe's Criminal Evidence.
R. & R. . .	Russell and Ryan.
Russ. Cr. . .	Russell on Crimes, 4th edition (where the 5th edition is not referred to).
Salk. . .	Salkeld's Reports.
S. L. C. . .	Smith's Leading Cases.
Starkie, N. P. .	Starkie's Nisi Prius Reports.
Steph. Com. .	Stephen's Commentaries.
St. Tr. . .	State Trials.
T. R. . .	Term Reports.
Ves. . .	Vesey's Reports.
Viner's Abt. .	Viner's Abridgement.

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EXPLANATION OF TERMS.

MAXIMUM PUNISHMENT.

WHENEVER it is stated that any offender is liable, on conviction of any offence, to a specified term of penal servitude as a maximum punishment, the meaning (unless any qualification is specified) is that he may be sentenced to that or to any shorter term of penal servitude not being less than five years, or, instead of such term of penal servitude, to imprisonment for any term not exceeding two years, with or without hard labour.

If the maximum punishment specified is a term of imprisonment with hard labour or a fine, the meaning (unless any qualification is specified) is that the offender may be sentenced to that or to any shorter term of imprisonment, with or without hard labour, or to any smaller fine.

If the maximum punishment specified is a term of hard labour (as distinguished from imprisonment with hard labour) the meaning is that the offender must be sentenced to imprisonment with hard labour, but may be sentenced for any term not exceeding the term specified.

SOLITARY CONFINEMENT AND WHIPPING.

The letter S at the end of a reference to a statute means that an offender against the enactment referred to may be sentenced to solitary confinement. The letter W that such offender may, if a male under sixteen years of age, be sentenced to whipping.

PENAL SERVITUDE AND TRANSPORTATION.

In cases in which the punishment appointed for an offence by statute is transportation, penal servitude has been uniformly substituted. In cases in which the minimum amount of penal servitude is three years, five years has been uni-

formly substituted, in order to give the effect of 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; and 27 & 28 Vict. c. 47, s. 2; which substituted penal servitude for transportation, and a minimum term of five for a minimum term of three years penal servitude.

MINIMUM PUNISHMENTS.

It is enacted by 9 & 10 Vict. c. 24, s. 1, that "in all cases where the Court is now (June, 1846) by law empowered or required to award a sentence of transportation exceeding seven years, it shall be lawful for such Court at its discretion to award a sentence of transportation for a term of years not less than seven years, or to award such sentence of imprisonment for any period not exceeding two years, with or without hard labour, as shall to the Court in its discretion appear just under all the circumstances."

The effect of this enactment is given when necessary by substituting the expression "shall be liable to a maximum punishment of —— years penal servitude," for the expression "shall be liable to be transported for —— years."

To avoid constant repetition of the same references, the Acts mentioned under this and the last heading are not referred to in the notes giving the authorities for the various articles hereinafter contained.

ALTERATIONS IN LANGUAGE OF STATUTES.

The future and the past future are uniformly altered to the present tense. Where "shall" is used as an imperative "must" is substituted. Where the language of a statute appeared needlessly verbose for common purposes, the leading word or an equivalent is preserved in the text, and the words omitted are inserted in a foot note for reference if necessary.

The language of the statutes is in most cases rearranged for the sake of clearness; but the words "redrawn," "condensed," or others of the same sort, indicate the cases in which the greatest alterations have been made.

A DIGEST

OF

THE CRIMINAL LAW.

PART I.

PRELIMINARY.

CHAP. I.—PUNISHMENTS.

CHAP. II.—CLASSIFICATION OF CRIMES AND GENERAL PROVISIONS AS TO THEIR PUNISHMENT.

CHAP. III.—GENERAL EXCEPTIONS.

CHAP. IV.—PARTIES TO THE COMMISSION OF CRIMES—PRINCIPAL AND ACCESSORY.

CHAP. V.—DEGREES IN THE COMMISSION OF CRIME—INCITEMENT—CONSPIRACY—ATTEMPTS.

CHAPTER I.

OF PUNISHMENTS.

ARTICLE 1.

PUNISHMENTS.

THE following punishments are inflicted by the law of England for the crimes hereinafter defined:—Death, penal servitude, imprisonment, detention in a reformatory school, subjection to police supervision, whipping, fines, putting under recognizance.

ARTICLE 2.

PUNISHMENT OF DEATH.

[1] The punishment of death is inflicted by hanging the offender by the neck till he is dead.

[1] As to treatment of prisoners under sentence of death in prison, see 28 & 29 Vict. c. 126, Sch. I. 61.

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Article 3.

PUNISHMENT OF PENAL SERVITUDE.

[1]The punishment of penal servitude consists in keeping the offender in confinement and compelling him to labour in the manner and under the discipline appointed by the Acts relating to penal servitude.

Article 4.

PUNISHMENT OF IMPRISONMENT.

[2]The punishment of imprisonment consists in the detention of the offender in prison, and in his subjection to the discipline appointed for prisoners during the period expressed in the sentence.

Imprisonment is of three kinds:

(i.) Imprisonment with hard labour.

(ii.) Imprisonment without hard labour.

(iii.) Imprisonment as a misdemeanant of the first division.

Imprisonment of the first and second kinds may, in the cases hereinafter specified, be accompanied or not with solitary confinement.

Article 5.

IMPRISONMENT TO BE SEPARATE.

[3]All prisoners sentenced to imprisonment with or without hard labour must be prevented from holding any communication with each other, either by every prisoner being kept in a separate cell by day and by night, except when he is at chapel or taking exercise, or by every prisoner being confined to his cell and being subjected to such superintendence during the day as will, consistently with the provisions of the Prisons Act, 1865, prevent his communication with any other prisoner.

[1] 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47; and see 5 Geo. 4, c. 84. The subject of the nature of the punishment of penal servitude is discussed at length in *R.* v. *Mount*, L. R. 6 P. C. 283.

[2] See 28 & 29 Vict. c. 126.

[3] 28 & 29 Vict. c. 126, s. 17.

ARTICLE 6.

HARD LABOUR.

[1] Hard labour is of two classes, consisting—

(1.) Of work at the tread-wheel, shot drill, crank, capstan, stone-breaking, or such other like description of hard bodily labour as may be appointed by the justices in sessions assembled with the approval of the Secretary of State.

(2.) Of such other description of bodily labour as may be appointed by [2] the justices in sessions assembled with the approval of the Secretary of State.

[3] Every male prisoner of sixteen years of age and upwards sentenced to hard labour must, during the whole of his sentence, be kept at hard labour of the first class for such number of hours, not more than ten or less than six (exclusive of meals), as may be prescribed by the visiting justices, subject to the following provisions:—

(1.) In cases in which the sentence is for more than three months the visiting justices may, after the expiration of the first three months of the sentence, substitute hard labour of the second for hard labour of the first class.

(2.) If the surgeon certifies that any prisoner is unfit to be kept at either class of hard labour during the whole or any part of the prescribed hours, he shall not be kept to such labour during such time.

(3.) If the sentence is for a period not exceeding fourteen days, prisoners may, in pursuance of rules made by the justices in sessions, be kept in separate confinement at hard labour of the second class during the whole period of their sentences.

[4] Every male prisoner under the age of sixteen sentenced to hard labour, and every female prisoner sentenced to hard labour, must be kept at hard labour of the second-class during such number of hours—not more than ten or less

[1] 28 & 29 Vict. c. 126, s. 19.

[2] For the meaning of this expression see 28 & 29 Vict. c. 126, s. 6.

[3] Ibid. Sch. I. 34 (redrawn).

[4] Ibid. Sch. I. 35.

than six (exclusive of meals)—in each day as may be prescribed by the visiting justices, unless the surgeon certifies that he or she is unfit for hard labour.

Article 7.

EMPLOYMENT OF PRISONERS NOT SENTENCED TO HARD LABOUR.

[1] Provision must be made by the visiting justices for the employment of all prisoners sentenced to imprisonment without hard labour. The visiting justices must make rules as to the nature and amount of such employment; but no prisoner not sentenced to hard labour can be punished for neglect of work, excepting by such alteration in the scale of diet as may be established by the rules of the prison in the case of neglect of work by such prisoners.

Article 8.

SOLITARY CONFINEMENT.

[2] In cases in which a court or judge is authorized to direct that an offender shall be kept in solitary confinement, such solitary confinement may not be for any longer period than one month at a time, or more than three months in the space of one year.

Article 9.

IMPRISONMENT AS A MISDEMEANANT OF THE FIRST DIVISION.

[3] Imprisonment as a misdemeanant of the first division is inflicted by confining the offender within the prison. Such a misdemeanant is not to be deemed to be a criminal prisoner.

He is permitted to maintain himself, and to procure or receive, at proper hours, food, wine, malt liquor, clothing, bedding, or other necessaries; but subject to examination

[1] 28 & 29 Vict. c. 126, Sch. I. 38.

[2] 7 Wm. 4 & 1 Vict. c. 90, s. 5.

[3] 28 & 29 Vict. c. 126, Sch. I. 16, 31. The rules upon which this article is founded, apply in terms to debtors only; but as a misdemeanant of the first division is not to be regarded as a "criminal prisoner," it would seem to follow that he is to be treated as a debtor.

and to such rules as may be approved by the visiting justices.

He may be permitted to work and follow his trade or profession, provided such employment does not interfere with the regulations of the prison.

Article 10.

DETENTION IN A REFORMATORY.

[1]The punishment of detention in a reformatory school is inflicted by detaining the offender in such a school, and subjecting him to the discipline thereof, in the manner provided by the statutes relating to reformatory schools.

Article 11.

SUBJECTION TO POLICE SUPERVISION.

[2]The punishment of subjection to police supervision consists in the subjection of every person so punished to the following obligations when at large:—

(*a.*) He must notify the place of his residence, and every change of his residence, within the same [3]police district, to the [3]chief officer of police of the district in which his residence is situate.

(*b.*) Whenever he changes his place of residence from one police district to another, he must notify such change of residence to the chief officer of police of the police district which he is leaving, and to the chief officer of police of the police district into which he goes to reside. He must make the notifications required to be made in (*a.*) and (*b.*) within forty-eight hours after he comes into the place where they are required to be made.

(*c.*) Once in each month he must—if a male—report himself at such time, and personally, or by letter, as may be prescribed by the chief officer of police of the district, either to such chief officer himself, or to such person as he may direct.

[1] 29 & 30 Vict. c. 117.

[2] 34 & 35 Vict. c. 112, s. 8, (language slightly altered.)

[3] For definitions of "police district," and "chief officer of police," see 34 & 35 Vict. c. 112, s. 20.

(*d.*) If he fails to do any one of these things within the proper time he is liable to be imprisoned, with or without hard labour, for any period not exceeding one year.

ARTICLE 12.

PUNISHMENT OF WHIPPING.

(*a.*) [1] When no special provisions are made as to the punishment of whipping the number of strokes and the instrument to be used are left to the discretion of the person by whom the whipping is inflicted.

(*b.*) [2] When the punishment of whipping is awarded by order of one or more justices, in exercise of their power of summary conviction, the order awarding such punishment must specify the number of strokes to be inflicted, and the instrument to be used in the infliction of them. In the case of an offender whose age does not exceed fourteen years, the number of strokes inflicted must not exceed twelve, and the instrument used must be a birch rod. No such offender may be whipped more than once for the same offence.

(*c.*) [3] When the punishment of whipping is awarded by order of a Court for an indictable offence, under the Larceny Act, 1861, the Malicious Injuries to Property Act, 1861, or the Offences against the Person Act, 1861, the Court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they are to be inflicted must be specified by the Court in the sentence.

(*d.*) [4] When the punishment of whipping is awarded under the Act for the further security of Her Majesty's subjects from personal violence (1863), the Court may direct that the offender—if a male—in addition to the other punishment

[1] Such was the practice when whipping was inflicted as a common law punishment, and such must still be the practice where no statutory directions are given as to the mode of inflicting it. The only limitation is contained in the declaration of the Bill of Rights against "illegal and cruel punishments" (1 W. & M. sess. 2, c. 2, preamble).

[2] 25 Vict. c. 18, s. 1.

[3] 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 100, s. 70.

[4] 26 & 27 Vict. c. 44, s. 1.

awarded to him, be once, twice, or thrice privately whipped, subject to the following provisions:—

(i.) In the case of an offender whose age does not exceed sixteen years, the number of strokes at each such whipping must not exceed twenty-five, and the instrument used must be a birch rod.

(ii.) In the case of any other male offender, the number of strokes must not exceed fifty at each such whipping.

(iii.) In each case the Court in its sentence must specify the number of strokes to be inflicted and the instrument to be used.

(iv.) Such whipping must in no case take place after the expiration of six months from the passing of the sentence.

(v.) Every such whipping to be inflicted on a person sentenced to penal servitude must be inflicted on him before he is removed to a convict prison, with a view to undergoing the sentence of penal servitude.

Article 13.

FINE.

[1] The punishment of fining consists in ordering the offender to pay to Her Majesty a sum of money expressed in the sentence. When no particular sum is limited as the maximum amount of a fine, the fine imposed must not be excessive.

Article 14.

PUTTING UNDER RECOGNIZANCES.

The punishment of putting under recognizances consists in ordering the offender to promise to pay to her Majesty a sum of money expressed in the recognizance if he breaks the condition thereof, and to find other persons to make a similar promise on his behalf and as his sureties. In cases in which the court or magistrate is authorized to require such securities, they may direct the offender to be imprisoned till he enters into the recognizance and finds the sureties.

[1] 1 W. & M. sess. 2, c. 2. See also Magna Charta, 'Salvo contenemento suo.'

CHAPTER II.

CLASSIFICATION OF CRIMES AND GENERAL PROVISIONS AS TO THEIR PUNISHMENT.

ARTICLE 15.

TREASON, FELONY, AND MISDEMEANOR.

EVERY crime is either treason, felony, or misdemeanor. Every crime which amounts to treason or felony is so denominated in the definitions of crimes hereinafter contained. All crimes not so denominated are misdemeanors.

ARTICLE 16.

CONSEQUENCES OF A CONVICTION OF TREASON OR FELONY.

The consequences of a conviction of treason or felony are as follows:—

(*a.*) [1] Every person convicted of treason or felony may be condemned to the payment of the whole or any part of the costs and expenses incurred in and about his prosecution and conviction.

(*b.*) [2] Immediately upon the conviction of any person for felony, the Court before which he is convicted may award any sum of money not exceeding £100, by way of satisfaction or compensation for any loss of property suffered by any person through or by means of such felony, upon the application of such person. Such sum is to be deemed to be a judgment debt due to the person entitled to receive the same from the person so convicted.

(*c.*) [3] Every person sentenced to death, to penal servitude, or to any term of imprisonment with hard labour, or exceeding twelve months:

[1] 33 & 34 Vict. c. 23, s. 3. The section contains various subsidiary provisions as to costs, which do not bear on the punishment of the offence.

[2] 33 & 34 Vict. c. 23, s. 4.

[3] Ibid. s. 2.

(i.) Becomes incapable of holding any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever in England, Wales, or Ireland.

Such incapacity continues until such person has suffered the punishment to which he has been sentenced, or such other punishment as by competent authority may be substituted for the same, or until he receives a free pardon from her Majesty.

(ii.) If any such person holds, at the time of his conviction, any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or other corporation, or is entitled to any pension or superannuation allowance, payable by the public or out of any public fund; such office, benefice, employment, or place, forthwith becomes vacant, and such pension or superannuation allowance, or emolument, forthwith determines and ceases to be payable, unless such person receives a free pardon from her Majesty within two months after such conviction, or [1] before the filling up of such office, benefice, employment, or place, if given at a later period.

(*d.*) [2] Every person sentenced to death, or to penal servitude, or against whom sentence of death is recorded, is disabled from suing any person, from alienating or charging any property, and from making any contract.

(*e.*) [3] The custody and management of the property of any such person may be committed to an administrator, or interim curator, appointed in the manner and invested with the powers described in the statute, 33 & 34 Vict. c. 23.

(*f.*) [4] Any person subject to the provisions of clauses (*d*) or (*e*) ceases to be affected by them when he dies, or is made

[1] I suppose this means if the pardon is given more than two months after the conviction.

[2] 33 & 34 Vict. c. 23, s. 8.

[3] See ss. 9–29 inclusive.

[4] 33 & 34 Vict. c. 23, s. 7.

bankrupt, or has suffered any punishment to which sentence of death has been commuted, or has undergone the full term of penal servitude to which he was sentenced, or such other punishment as may have been substituted for it by lawful authority, or receives her Majesty's pardon.

Article 17.

RECORDING SENTENCE OF DEATH.

[1] When any person is convicted of any felony, except murder, punishable with death, the Court may, if it thinks fit, instead of pronouncing judgment of death on such offender, order the same to be entered of record, and a record of every judgment so entered has the same effect as if the judgment had been duly pronounced and the offender reprieved by the Court.

Article 18.

PUNISHMENT FOR FELONY IF NO EXPRESS PUNISHMENT PROVIDED —FELONIES UNDER THE CONSOLIDATION ACTS.

[2] Every person convicted of any felony for which no punishment is specially provided by the law in force for the time being, is liable upon conviction thereof to be sentenced to penal servitude for any period not exceeding seven years, or to be imprisoned with or without hard labour and solitary confinement for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped, in addition to such imprisonment.

[3] Every person convicted of any felony (except murder) punishable under any of the Criminal Law Consolidation Acts, 1861, may, in addition to any punishment thereby authorized, be required to enter into his own recognizances and to find sureties, both or either, for keeping the peace.

[1] 4 Geo. 4, c. 48, ss. 1, 2 (very much abridged). By 6 & 7 Wm. 4, c. 30, the same power was given to the Court in cases of murder (*R.* v. *Hogg*, 2 Mo. & R. 380), but this Act was repealed by 24 & 25 Vict. c. 95.

[2] 7 & 8 Geo. 4, c. 28, ss. 8, 9, modified by 1 Vict. c. 90, s. 5; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

[3] 24 & 25 Vict. c. 96, s. 117; Ibid. c. 97, s. 73; Ibid. c. 98, s. 51; Ibid. c. 99, s. 38; Ibid. c. 100, s. 71.

ARTICLE 19.

PREVIOUS CONVICTIONS.

(*a.*) [1] If any person is convicted of any felony, not punishable with death on the 1st July, 1827, committed after a previous conviction for felony, he is liable, on such subsequent conviction, to be sentenced to penal servitude for life, or for any term not less than seven years, or to be imprisoned with or without hard labour, and with or without solitary confinement, for any term not exceeding four years, and if a male, to be once, twice, or thrice publicly or privately whipped in addition to such imprisonment.

Provided that a person convicted of simple larceny after a previous conviction for felony, cannot be sentenced to a longer term of penal servitude than ten years.

(*b.*) When any person is convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded against him, is a period of seven years.

[1] 7 & 8 Geo. 4, c. 28, s. 11. By this Act a person convicted of larceny, after a previous conviction, was liable to transportation for life, &c. By 16 & 17 Vict. c. 99, s. 12, it was enacted that no person shall be liable to be transported by reason only of a previous conviction for larceny, but every such person may be sentenced to not more than ten or less than four years penal servitude. This enactment was repealed by 24 & 25 Vict. c. 95, after having been to some extent superseded by 20 & 21 Vict. c. 3, s. 2, which abolished transportation. By 24 & 25 Vict. c. 96, s. 7, it was enacted that a person convicted of simple larceny after a previous conviction for felony should be liable to a maximum punishment of ten years penal servitude (S. W.). Probably this was meant to be a substitute for 7 & 8 Geo. 4, c. 28, s. 11, so far as that section applies to convictions for simple larceny, but they are not in terms inconsistent. Theoretically, therefore, I suppose, a person might on a second conviction for larceny be sentenced to penal servitude for life, or imprisonment with hard labour for four years, and to be thrice publicly whipped. The question of the legality of such a sentence is not likely to occur in practice; see Article 321, note. By 27 & 28 Vict. c. 47, s. 2, a person sentenced to penal servitude, after a previous conviction for felony, cannot be sentenced to less than seven years. Practically, therefore, the net result of all this legislation is as stated in the text. The "simple" larceny of the 24 & 25 Vict. c. 96, obviously means larceny not subjected to any special punishment by reason of any of the aggravating circumstances provided for in that Act. Hale uses the expression "simple" larceny in contradistinction to larceny with violence, which is robbery: 1 Hale, P. C. 503.

(*c.*) [1] When any person is convicted of any felony, or of any of the misdemeanors mentioned in the note hereto,[2] and a previous conviction of any felony, or any such misdemeanor is proved against him, the Court having cognizance of the indictment may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or such less period as the Court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes.

Article 20.

SPECIAL OFFENCES IN THE CASE OF PERSONS TWICE CONVICTED.

[3] Every person convicted on indictment of any felony or any such misdemeanour as is mentioned in the note hereto,[4] and having had a previous conviction proved against him, is liable to a maximum punishment of a year's imprisonment and hard labour, if at any time within seven years immediately after the expiration of the sentence passed upon him for the last of such offences,

(*a.*) on his being charged by a constable with getting his livelihood by dishonest means, and being brought before a Court of summary jurisdiction, it appears to such Court that there are reasonable grounds for believing that he is getting his livelihood by dishonest means; or if,

(*b.*) on being charged with any offence punishable on indictment or summary conviction, and on being required by a Court of summary jurisdiction to give his name and address,

[1] 34 & 35 Vict. c. 112, s. 8, and s. 20, which defines the word "crime" employed in s. 8.

[2] Viz., 1. Uttering false or counterfeit coin. 2. Possessing counterfeit gold or silver coin. 3. Obtaining goods or money by false pretences. 4. Conspiracy to defraud. 5. Being found by night armed with intent to break into a dwelling-house. 6. Being found by night, without lawful excuse, with housebreaking implements. 7. Being found by night with face blackened, &c., with intent to commit felony. 8. Being found by night in any dwelling-house or building with intent to commit felony.

[3] 34 & 35 Vict. c. 112, ss. 7, 20.

[4] See Note 2, *supra*.

he refuses to do so, or gives a false name or false address; or if

(*c.*) he is found in any place, whether public or private, under such circumstances as to satisfy the Court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction; or if

(*d.*) he is found in or upon any dwelling-house, or any building, yard, or premises, being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure-ground, or nursery-ground, or in any building, or erection in any garden, orchard, pleasure-ground, or nursery-ground, without being able to account to the satisfaction of the Court before whom he is brought for his being found on such premises.

Article 21.

Punishment of persons under sixteen years of age.

[1] Whenever any offender who, in the judgment of the Court, justices, or magistrate before whom he is charged, is under the age of sixteen years is convicted, on indictment or in a summary manner, of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the term of ten days or a longer term, the Court, justices, or magistrate may also sentence him to be sent at the expiration of his period of imprisonment to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years.

A youthful offender under ten is not to be so directed to be sent to a reformatory school unless he has been previously charged with some crime or offence punishable with penal servitude or imprisonment, or is sentenced by a judge of assize or court of general quarter or quarter sessions.

[1] 29 & 30 Vict. c. 117, s. 14.

Article 22.

PUNISHMENT OF MISDEMEANORS.

[1] Every person convicted of a misdemeanor for which no special punishment is provided by law is liable to fine and imprisonment without hard labour (both or either), and to be put under recognizances to keep the peace and be of good behaviour at the discretion of the Court.

[2] Whenever any person convicted of misdemeanor is sentenced to imprisonment without hard labour, the Court or judge before whom such person has been tried may order, if such Court or judge thinks fit, that such person shall be treated as a misdemeanant of the first division.

[3] Any person convicted of any indictable misdemeanor punishable under any one of the Criminal Law Consolidation Acts, 1861, may, in addition to or in lieu of the punishment by such Act provided, be fined and required to enter into his own recognizances, and to find sureties (both or either) for keeping the peace and being of good behaviour, but no person may be imprisoned for more than one year for not finding such sureties.

Article 23.

CUMULATIVE PUNISHMENTS.

[4] When an offender is convicted of more offences than one, he may be sentenced to a separate punishment for each offence, and the Court may, if it thinks fit, direct that the one punishment shall not begin until the other has been undergone.

[1] 1 Russ. Cr. 92; *R.* v. *Dunn*, 12 Q. B. 1041.

[2] 28 & 29 Vict. c. 129, s. 67.

[3] 24 & 25 Vict. c. 96, s. 117; Ibid. c. 97, s. 73; Ibid. c. 98, s. 51; Ibid. c. 99, s. 38; Ibid. c. 100, s. 71. The provisions of these Acts will be found in Parts V. and VI. of the Digest.

[4] Opinion of the judges in *Wilkes's Case*, 19 St. Tr. 1132-3.

CHAPTER III.

GENERAL EXCEPTIONS.

ARTICLE 24.

DEFINITIONS SUBJECT TO EXCEPTIONS.

EVERY definition of any crime hereinafter contained is subject to the following general exceptions, except in the cases in which the contrary is expressed:—

ARTICLE 25.

CHILDREN UNDER SEVEN.

[1] No act done by any person under seven years of age is a crime.

ARTICLE 26.

CHILDREN BETWEEN SEVEN AND FOURTEEN.

[2] No act done by any person over seven and under fourteen years of age is a crime, unless it be shewn affirmatively that such person had sufficient capacity to know that the act was wrong.

ARTICLE 27.

INSANITY.

[3] No act is a crime if the person who does it is at the time when it is done prevented [[4] either by defective mental power or] by any disease affecting his mind

(*a.*) from knowing the nature and quality of his act; or,

(*b.*) from knowing that the act is [5] wrong; [[4] or,

(*c.*) from controlling his own conduct, unless the absence of the power of control has been produced by his own default.]

[1] 1 Hale, P. C. 27–8; 1 Russ. Cr. 7.

[2] *R.* v. *Owen*, 4 C. & P. 236; and see cases collected 1 Russ. Cr. 7–10.

[3] For the authorities, see Note I.

[4] The parts of the article bracketed are doubtful.

[5] The word "wrong" is variously interpreted as meaning:—1. Morally wrong. 2. Illegal. The practical effect of these differences is shewn in Illustrations (4), (5), and (6).

But an act may be a crime although the mind of the person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act.

Illustrations.

(1.) A kills B under an insane delusion that he is breaking a jar. A's act is not a crime.

(2.) A kills B knowing that he is killing B, and knowing that it is wrong to kill B; but his mind is so imbecile that he is unable to form such an estimate of the nature and consequences of his act as a person of ordinary intelligence would form. A's act is not a crime if the words within the first set of brackets are law. If they are not it is.

(3.) A kills B knowing that he is killing B, and knowing that it is illegal to kill B; but under an insane delusion that the salvation of the human race will be obtained by his execution for the murder of B, and that God has commanded him (A) to produce that result by those means. A's act is a crime if the word "wrong" has the second of the two meanings ascribed to it in the note. It is not a crime if the word "wrong" has the first of those two meanings.

(4.) A suddenly stabs B under the influence of an impulse caused by disease, and of such a nature that nothing short of the mechanical restraint of A's hand would have prevented the stab. A's act is a crime if (*c*) is not law. It is not a crime if (*c*) is law.

(5.) A suddenly stabs B under the influence of an impulse caused by disease, and of such a nature that a strong motive, as, for instance, the fear of his own immediate death, would have prevented the act. A's act is a crime whether (*c*) is or is not law.

(6.) A permits his mind to dwell upon and desire B's death; under the influence of mental disease this desire becomes uncontrollable, and A kills B. A's act is a crime whether (*c*) is or is not law.

(7.) A, a patient in a lunatic asylum, who is under a delusion that his finger is made of glass, poisons one of his attendants out of revenge for his treatment, and it is proved that the delusion had no connection whatever with the act. A's act is a crime.

Article 28.

PRESUMPTION OF SANITY.

[1] Every person is presumed to be sane, and to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person; but the jury may have regard to his appearance and behaviour in court.

[1] *R.* v. *Oxford*, 9 C. & P. 525; *R.* v. *Stokes*, 3 C. & K. 185.

ARTICLE 29.

DRUNKENNESS.

[1] Voluntary drunkenness is not regarded as a disease affecting the mind within the meaning of Article 27; but involuntary drunkenness, and diseases caused by voluntary drunkenness, fall, so far as they affect the mind, within that article.

If the existence of a specific intention is essential to the commission of a crime, the fact that an offender was drunk when he did the act which, if coupled with that intention, would constitute such crime, should be taken into account by the jury in deciding whether he had that intention.

Illustrations.

(1.) [1] A, in a fit of voluntary drunkenness, shoots B dead, not knowing what he does. A's act is a crime.

(2.) [1] A, under the influence of a drug fraudulently administered to him, shoots B dead, not knowing what he does. A's act is not a crime.

(3.) [1] A, in a fit of delirium tremens caused by voluntary drunkenness, kills B, mistaking him for a wild animal, attacking A. A's act is not a crime.

(4.) [2] A is indicted for inflicting on B an injury dangerous to life with intent to murder B. The fact that A was drunk when he inflicted the injury ought to be taken into account by the jury in deciding whether A intended to murder B or not.

ARTICLE 30.

MARRIED WOMEN.

[3] If a married woman commits a theft or receives stolen goods knowing them to be stolen in the presence of her

[1] 1 Hale, P. C. 32–3. Illustrations (1), (2), and (3), are founded on this passage.

[2] *R.* v. *Cruse*, 8 C. & P. 546.

[3] 1 Hale, P. C. 45; 1 Hawk. P. C. 4; *R.* v. *Hughes*, 1 Russ. Cr. 41; *R.* v. *Atkinson*, 1 Russ. Cr. 47; *R.* v. *Smith*, D. & B. 553; *R.* v. *Archer*, R. & M. 143; *R.* v. *Brooks*, Dear. 184; *R.* v. *Wardroper*, Bell, C. C. 249. As to felonies in general, see 1 Russ. Cr. 32–4. As to high treason, murder, and robbery, see 1 Hale, P. C. 45; Dalton, c. 157; 1 Hawk. P. C. 4; *R.* v. *Buncombe*, 1 Cox, C. C. 183; but as to robbery see Mr. Carrington's argument in *R.* v. *Cruse*, 8 C. & P. 556. In *R.* v. *Torpey*, the present Recorder of London held that the doctrine applied to robbery, 12 Cox, C. C. 48–9. As to misdemeanors in general, see note to *R.* v. *Price*, 8 C.

husband, she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the circumstances of the case shew that in point of fact she was not coerced.

It is uncertain how far this principle applies to felonies in general.

It does not apply to high treason or murder.

It probably does not apply to robbery.

It applies to uttering counterfeit coin.

It seems to apply to misdemeanors generally.

ARTICLE 31.

COMPULSION.

An act which if done willingly would make a person a principal in the second degree or an aider and abettor in a crime, may be innocent if the crime is committed by a number of offenders, and if the act is done only because during the whole of the time in which it is being done, the person who does it is compelled to do it by threats on the part of the [1]offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence.

Illustrations.

(1.) [2] A, B, and C, engaged in a rebellion, force D to join the rebel army and to do duty as a soldier by threats of death continuing during the whole of his service. D's act is not a crime.

(2.) [3] A mob employed in breaking threshing machines force several

& P. 20; and 1 Russ. Cr. p. 145, note (b), 5th Ed.; see too *R.* v. *Torpey*, 12 Cox, C. C. 48–9. As to uttering, see *R.* v. *Price*, 8 C. & P. 19. As to false swearing, *R.* v. *Dicks*, 1 Russ. Cr. 16. As to the general doctrine, see Note II.

[1] 1 Hale, P. C. 43–4, 49, and see Illustrations.

[2] *R.* v. *M'Growther*, 18 St. Tr. 394 (A. D. 1746).

[3] *R.* v. *Crutchley*, 5 C. & P. 133. The report says nothing as to the nature of the force. Probably it was by threats of personal violence. It is singular that the law upon this subject should be so very meagre. The subject is treated at some length in 1 Hale, cc. vii., viii., and ix., pp. 43–52, but in a very unsatisfactory way. It would seem that in all common cases the fact that a crime is done unwillingly and in order to avoid injury, ought to affect rather the punishment than the guilt.

persons to go with them, and force each person to give each threshing machine a blow with a sledge hammer; A, one of the persons so forced, runs away as soon as he can. A's act is not a crime.

Article 32.

NECESSITY.

An act which would otherwise be a crime may be excused if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.

Illustrations.

(1.) [1] A, the Governor of Madras, acts towards his council in an arbitrary and illegal manner. The council depose and put him under arrest, and assume the powers of government themselves. This is not an offence if the acts done by the council were the only means by which irreparable mischief to the establishment at Madras could be avoided.

(2.) [2] A and B, swimming in the sea after a shipwreck, get hold of a plank not large enough to support both; A pushes off B, who is drowned. This is not a crime.

Article 33.

IGNORANCE OF LAW.

The fact that an offender is ignorant of the law is in no case an excuse for his offence, but it may be relevant to the question whether an act which would be a crime if accom-

[1] *R.* v. *Stratton & Others*, 21 St. Tr. 1045; see Lord Mansfield's judgment, pp. 1222–6.

[2] Bacon's Maxims, No. 5. The case has actually occurred in the United States. See *Commonwealth* v. *Holms*, 1 Wall, Jr. 1, quoted at length in Wharton on Homicide, s. 560. In this case shipwrecked sailors and passengers escaping in a boat which could not hold all, the sailors threw some of the passengers overboard. The Court held that the passengers ought to have been preferred to the sailors, unless the presence of all the sailors was required for the common safety, but "under any circumstances it was held the proper method of determining who was to be the first victim out of the particular class was by ballot." I doubt whether an English court would take this view. It would be odd to say that the two men on the raft were bound to toss up as to which should go.

panied by a certain intention or other state of mind, and not otherwise, was in fact accompanied by that intention or state of mind or not.

Illustrations.

(1.) [1]A, a foreigner unacquainted with the law of England, kills B in a duel in England. A's act is murder although he may have supposed it to be lawful.

(2.) [2]A, a poacher, sets wires for game, which are taken by B, a gamekeeper, under the authority of an Act of Parliament (5 Anne, c. 14, s. 4), of the existence of which A is ignorant. A forcibly takes the wires from B, and is tried for robbery. His ignorance of the Act is relevant to the question whether he took the wires under a claim of right.

Article 34.

IGNORANCE OF FACT.

An alleged offender is in general deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence,

provided that, when an offence is so defined by statute that the act of the offender is not a crime unless some independent fact co-exists with it, the Court must decide whether it was the intention of the legislature that the person doing the forbidden act should do it at his peril, or that his ignorance as to the existence of the independent fact, or his mistaken belief in good faith and on reasonable grounds that it did not exist, should excuse him,

provided also that voluntary or negligent ignorance of any such fact is no excuse for any such offence.

Illustrations.

(1.) [3]A, under an insane delusion, kills B. If the delusion is such that its truth would justify him in doing so, his act is not a crime. The delu-

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[1] *Ex parte Barronet*, 1 E. & B. 1.

[2] *R.* v. *Hall*, 3 C. & P. 409. In *R.* v. *Reed*, Car. & Mar. 308, Coleridge, J., said: "Ignorance of the law cannot excuse any person, but at the same time when the question is with what intent a person takes, we cannot help looking into their state of mind, as if a person takes what he believes to be his own it is impossible to say he is guilty of felony.

[3] *MacNaghten's Case*, 10 Cl. & Fin. 200.

sion would also be evidence that A did not know he was doing wrong even if its truth would not justify the act.

(2.) [1]A making a thrust with a sword at a place where, upon reasonable grounds, he supposes a burglar to be, kills a person who is not a burglar. A is in the same situation as if he had killed a burglar.

(3.) [2]A abducts B, a girl under fifteen years of age, from her father's house, believing in good faith and on reasonable grounds that B is eighteen years of age. A commits the offence of abduction, although if B had been eighteen years of age she would not have been within the statute.

(4.) [3]A, in the last illustration, abducts B, in ignorance of her age, and without making any inquiry about it. A commits the offence of abduction.

(5.) (SUBMITTED.) A breaks into B's house in Cornwall, at 5.45 A.M., supposing that it is past six, but forgetting that A's watch is set to London time. A commits burglary.

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[1] *Levet's Case*, 1 Hale, 474.

[2] *R.* v. *Prince*, L. R. 2 C. C. R. 151.

[3] *R.* v. *Prince*, Ibid. See judgment of Brett, J., p. 169, and see p. 174. It has been doubted whether a person commits bigamy who contracts a second marriage under a *bonâ fide* belief that the first husband or wife is dead. In *R.* v. *Turner*, 9 Cox, C. C. 145, Martin, B., directed a jury that if a woman had an honest belief that her husband was dead she was not guilty of bigamy, and this ruling was followed by Cleasby, B., in *R.* v. *Horton*, 11 Cox, C. C. 670. In *R.* v. *Gibbons*, 12 Cox, C. C. 237, Brett, J., after consulting Willes, J., held (says the report), "that a *bonâ fide* belief that the husband was dead was no defence, unless the seven years had passed." In that case, however, the "*bonâ fide* belief" appears to have arisen solely from the fact that the woman had not heard of her husband for upwards of six years. It was thus a gratuitous belief, founded on ignorance. It seems to me that if the belief was founded on positive evidence the case would be otherwise. Suppose, *e. g.*, a woman saw her husband fall overboard in the middle of the Atlantic, and saw a boat go out to search for him, and return without him; suppose that she took out administration to his estate, heard nothing of him for five years, and then married again, would she be guilty of bigamy if by some strange chance he had escaped? Surely not. I am informed that this view was taken by Denman, J., and Amphlett, J. A., in a case of *R.* v. *Moore*, tried at Lincoln Spring Assizes, 1877. I think the proviso in 24 & 25 Vict. c. 100, s. 57 (Art. 257), ought clearly to be read not as excluding the general common law principle stated in this article, but as supplementing and completing it, by providing that a second marriage, after seven years' ignorance as to the life of the first husband or wife, shall not be criminal, although the party so marrying has no positive reason to believe, and perhaps does not believe, that the absent person is dead.

CHAPTER IV.

PARTIES TO THE COMMISSION OF CRIMES—PRINCIPAL AND ACCESSORY.

ARTICLE 35.

PRINCIPALS IN FIRST DEGREE.

[1] WHOEVER actually commits, or takes part in the actual commission of a crime, is a principal in the first degree, whether he is on the spot when the crime is committed or not; and if a crime is committed partly in one place and partly in another, every one who commits any part of it at any place is a principal in the first degree.

Illustrations.

(1.) [2] A lays poison for B, which B takes in A's absence. A is a principal in the first degree.

(2.) [3] A steals goods from a ship, and lays them in a place at some distance, whence B, by previous concert, carries them away for sale. A and B are both principals in the first degree.

ARTICLE 36.

INNOCENT AGENT.

Whoever commits a crime by an innocent agent is a principal in the first degree.

Illustrations.

(1.) [4] A tells B, a child under seven, to bring him money belonging to C. B does so. A is a principal in the first degree.

(2.) [5] A, knowing a note to be forged, asks B, who does not know it to be

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[1] Foster, 347–50, gives the history of the distinction between principals in the first and second degree. See also Hale, ch. xxii. 1 P. C. 233; ch. xxxiv. 1 P. C. 435, and ch. lv. (612).

[2] Foster, 349, says simply that A is "a principal" without mentioning the degree, but as no one has "aided" or "abetted," it would seem that he must be a principal in the first degree.

[3] *R.* v. *Kelly*, 2 C. & K. 379.

[4] *R.* v. *Manley*, 1 Cox, C. C. 104.

[5] *R.* v. *Palmer*, 1 Russ. Cr. 53.

forged, to get it changed for him. B does so, and gives A the money. A is a principal in the first degree.

(3.) [1] B, in the last illustration, knows that the note is forged. A is an accessory before the fact.

ARTICLE 37.

PRINCIPALS IN THE SECOND DEGREE.

[2] Whoever aids or abets the actual commission of a crime, either at the place where it is committed, or elsewhere, is a principal in the second degree in that crime.

When the existence of a particular intent forms part of the definition of an offence, a person charged with aiding or abetting the commission of the offence must be shewn to have known of the existence of the intent on the part of the person so aided.

Illustrations.

(1.) [3] A, B, C, and D go out with a common design to rob. A commits the robbery; B stands by ready to help; C is stationed some way off to give the alarm if any one comes. A is a principal in the first degree, B, C, and D are principals in the second degree.

(2.) [4] B is indicted for inflicting on C an injury dangerous to life with intent to murder. A is indicted for aiding and abetting B. A must be shewn to have known that it was B's intent to murder C, and it is not enough to shew that A helped B in what he did.

ARTICLE 38.

COMMON PURPOSE.

[5] When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose.

[1] *R.* v. *Soares*, R. & R. 25.

[2] See cases in 1 Russ. Cr. 49–50. *R.* v. *Kelly*, R. & R. 421, perhaps marks the limit between a principal in the second degree and an accessory. In that case B stole horses and brought them to A, who was waiting half a mile off; A and B then rode away on them. It was held that A was an accessory before the fact. The distinction is now of no importance.

[3] Foster, 350.

[4] *R.* v. *Cruse*, 8 C. & P. 546.

[5] See cases referred to in the Illustrations. See also Fost. 350-2; 1 Russ. Cr. 65–6, 737–8, 742–6.

If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories unless they actually instigate or assist in its commission.

Illustrations.

(1.) [1] A constable and his assistants go to arrest A at a house in which are many persons. B, C, D, and others come from the house, drive the constable and his assistants off, and one of the assistants is killed, either by B, C, D, or one of their party. Each of the party is equally responsible for the blow, whether he actually struck it or not.

(2.) [2] Three soldiers go to rob an orchard. Two get into a fruit tree. The third stands at the door with a drawn sword, and stabs the owner, who tries to arrest him. The men in the tree are neither principals nor accessories, unless all three came with a common resolution to overcome all opposition.

(3.) [3] Smugglers fight with revenue officers. In the fight a smuggler fires a gun which kills another smuggler. The gun was not fired at any of the revenue officers. The man who fired the gun is responsible for the act, but not his companions.

(4.) [4] Two parties of persons fight in the street about the removal of goods to avoid a distress. One of the persons engaged kills a looker-on, totally unconcerned in the affray. The other persons present are not responsible for his crime.

(5.) [5] Two persons go out to commit theft. One unknown to the other put a pistol in his pocket, and shoots a man with it. The other person is not responsible for the shot.

Article 39.

Accessories before the fact.

[6] An accessory before the fact is one who [7] directly or indirectly counsels, procures, or commands any person to commit any felony or piracy [8] which is committed in consequence of such counselling, procuring, or commandment.

Every one who would have been an accessory before the

[1] *Sissinghurst House Case*, 1st Resolution; 1 Hale, P. C. 462.

[2] *Plummer's Case*, Foster, 353.

[3] Ibid. 352.

[4] *R.* v. *Hodgson and Others*, 1 Leach, 6.

[5] Per Park, J., *Duffey's Case*, 1 Lew. 194.

[6] 1 Hale, P. C. 615; 2 Hawk. P. C. 442; 1 Russ. Cr. 49–77. As to principals and accessories in forgery, see 2 Russ. Cr. 790. In the following articles I use the word "instigate" as equivalent to "counsel, procure, or command."

[7] *R.* v. *Cooper*, 5 C. & P. 535–7.
11 & 12 Will. 3, c. 7, s. 9.

fact if the crime committed, procured, or commanded had been a felony, is a principal if that crime is a misdemeanor.

Knowledge that a person intends to commit a crime, and conduct connected with and influenced by such knowledge, is not enough to make the person who possesses such knowledge, or so conducts himself, an accessory before the fact to any such crime, unless he does something to encourage its commission actively.

Illustrations.

(1.) [1]A supplies B with corrosive sublimate, knowing that B means to use it to procure her own abortion, but being unwilling that she should take the poison, and giving it to her because she threatened to kill herself if he did not. B does so use it and dies. Even if B is guilty of murdering herself, A is not an accessory before the fact to such murder.

(2.) [2] B and C agree to fight a prize fight for a sum of money; A, knowing of their intention, acts as stakeholder. B and C fight, and C is killed. A is not present at the fight and has no concern with it except being stakeholder. Even if in such a case there can be an accessory before the fact, A is not accessory before the fact to the manslaughter of C.

Article 40.

WHERE CRIME SUGGESTED IS COMMITTED IN A DIFFERENT WAY.

[3] When a person instigates another to commit a crime, and the person so instigated commits the crime which he was instigated to commit, but in a different way from that in which he was instigated to commit it, the instigator is an accessory before the fact to the crime.

Illustration.

A advises B to murder C by shooting, B murders C by stabbing, A is accessory before the fact to the murder of C.

Article 41.

WHERE CRIME COMMITTED IS PROBABLE CONSEQUENCE OF CRIME SUGGESTED.

[4] If a person instigates another to commit a crime, and the person so instigated commits a crime different from the one

[1] *R.* v. *Fretwell*, L. & C. 161. Contrast with this *R.* v. *Russell*, 1 Moody, 356.
[2] *R.* v. *Taylor*, L. R. 2 C. C. R. 147.
[3] Foster, 369-70.
[4] Ibid. 370.

which he was instigated to commit, but likely to be caused by such instigation, the instigator is an accessory before the fact.

Illustrations.

(1.) [1] A describes C to B, and instigates B to murder C. B murders D, whom he believes to be C, because D corresponds with A's description of C. A is accessory before the fact to the murder of D.

(2.) [1] A instigates B to rob C, B does so, C resists and B kills C. A is accessory before the fact to the murder of C.

(3.) [2] A advises B to murder C (B's wife) by poison. B gives C a poisoned apple, which C gives to D (B's child). B permits D to eat the apple, which it does, and dies of it. A is not accessory to the murder of D.

ARTICLE 42.

WHERE INSTIGATION IS COUNTERMANDED.

[3] If an accessory before the fact countermands the execution of the crime before it is executed, he ceases to be an accessory before the fact, if the principal had notice of the countermand before the execution of the crime, but not otherwise.

Illustration.

[3] A advises B to murder C, and afterwards, by letter, withdraws his advice. B does murder C. A is not an accessory before the fact if his letter reaches B before he murders C; but he is if it arrives afterwards.

ARTICLE 43.

INSTIGATION TO COMMIT A CRIME DIFFERENT FROM THE ONE COMMITTED.

When a person instigates another to commit a crime, and the person so instigated commits a different crime, the instigator is not accessory before the fact to the crime so committed.

[1] Foster, 370.

[2] *Saunder's Case*, Plowd. 475; 1 Hale, P. C. 431. This decision is of higher authority than Foster's *dicta;* and marks the limit to which they extend, if it does not throw some doubt on them.

[3] 1 Hale, P. C. 618. In the case supposed, the instigator would probably have committed the offence of inciting to the commission of a crime (Art. 47), though he would not be an accessory before the fact. It may also be doubted whether this doctrine would extend to the case of a man who did his best to countermand his advice, but failed, as by an accident in the course of post, &c.

Illustration.

[1] A instigates B to murder C, B murders D, A is not accessory before the fact to the murder of D.

Article 44.

ACCESSORIES AND PRINCIPALS IN SECOND DEGREE TREATED AS PRINCIPALS IN FIRST DEGREE.

[2] Accessories before the fact, principals in the second degree, and principals in the first degree in any felony, are each considered as having committed that felony, and each may be indicted, tried, convicted, and punished as if he alone and independently had committed the felony; although any other party to the crime may have been acquitted.

Article 45.

ACCESSORIES AFTER THE FACT.

[3] Every one is an accessory after the fact to felony who knowing a felony to have been committed by another, receives, comforts, or assists him, [4] in order to enable him to escape from punishment;

or rescues him from an arrest for the felony;

or having him in custody for the felony, intentionally and voluntarily suffers him to escape;

or opposes his apprehension,

Provided that a married woman who receives, comforts, or relieves her husband knowing him to have committed a felony, does not thereby become an accessory after the fact.

[1] Foster, 369, s. 1.

[2] 24 & 25 Vict. c. 94, s. 2, as explained by *R.* v. *Hughes*, Bell, C. C. 242. The section referred to applies only to cases in which a felony has been committed, and does not affect the common law offence of inciting to commit a felony (Art. 47). *R.* v. *Gregory*, L. R. 1 C. C. R. 77.

[3] 1 Russ. Cr. 63–6; 1 Hale, P. C. 618–20; 2 Hawk. P. C. Bk. II. c. 29.

[4] As to the addition of these words, see 2 Hawk. P. C. Bk. II. c. 29, s. 28-9.

Article 46.

PUNISHMENT OF ACCESSORIES AFTER THE FACT IN GENERAL AND UNDER THE CONSOLIDATION ACTS.

[1] Every accessory after the fact to any felony is guilty of a substantive felony for which he may be convicted, whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and for which he may be indicted either together with the principal felon or alone (except where it is otherwise specially enacted).

Every such offender is liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and the Court may require the offender to enter into his own recognizance, and to find sureties (both or either) for keeping the peace, in addition to such imprisonment; but no such person can be imprisoned for not finding sureties for any period exceeding one year.

[2] Every accessory after the fact to any felony punishable under the Larceny Act, 1861; the Malicious Injuries to Property Act, 1861; the Forgery Act, 1861; the Coinage Offences Act, 1861; or the Offences against the Person Act, 1861 (except murder), is liable upon conviction to the punishments above mentioned; but offenders against the first, second, and third, but not offenders against the fourth and fifth, of the said Acts may be sentenced to solitary confinement in addition to the other punishments above mentioned.

[1] 24 & 25 Vict c. 94, ss. 3, 4, as interpreted by *R.* v. *Falcon*, L. & C. 217. Each of the Consolidation Acts contains a section providing specifically that accessories before the fact, and principals in the second degree to felonies punishable thereby, shall be liable to the same punishment as the principals. These provisions would seem to be co-extensive in their operation with those of 24 & 25 Vict. c. 94, ss. 3, 4. See 24 & 25 Vict. c. 96, s. 98; Ibid. c. 97, s. 56; Ibid. c. 98, s. 49; Ibid. c. 99, s. 35; Ibid. c. 100, s. 67.

[2] 24 & 25 Vict. c. 96, ss. 98–117; Ibid. c. 97, ss. 56–73; Ibid. c. 98, ss. 49–51; Ibid. c. 99, ss. 35–38; Ibid. c. 100, ss. 35–71.

CHAPTER V.

DEGREES IN THE COMMISSION OF CRIME—INCITEMENT—CONSPIRACY—ATTEMPTS.

ARTICLE 47.

INCITEMENT TO COMMIT A CRIME.

[1]EVERY one who incites any person to commit any crime commits a misdemeanor, whether the crime is or is not committed.

ARTICLE 48.

CONSPIRACY TO COMMIT A CRIME.

[2]When two or more persons agree to commit any crime, they are guilty of the misdemeanor called conspiracy whether the crime is committed or not.

ARTICLE 49.

DEFINITION OF ATTEMPTS.

[3]An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.

The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case.

An act done with intent to commit a crime, the commission of which in the manner proposed was, in fact, impossible, is not an attempt to commit that crime.

[1] *R.* v. *Higgins*, 2 East, P. C. 5–22; *R.* v. *Scofield*, Cald. 397; *R.* v. *Gregory*, L. R. 1 C. C. 77. In *R.* v. *Leddington*, 9 C. & P. 79, a man was charged with inciting a man to commit suicide, and Alderson, B., directed an acquittal, saying "This is a case which by law we cannot try." The reasons for this direction are not given, and a note to the case does not make them clear. As to the case of *R.* v. *Welham*, see Note III.

[2] *Mulcahy* v. *R.*, L. R. 3 H. L. 317; *R.* v. *Bunn*, 12 Cox, C. C. 316, and see cases collected in Roscoe, Cr. Ev. 409–10.

[3] See cases referred to in illustrations, and Note IV.

The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.

Illustrations.

(1.) [1] A writes and sends to B a letter, inciting B to commit a felony. B. does not read the letter. A has attempted to incite B to commit a felony.

(2.) [2] A procures dies for the purpose of coining bad money. A has attempted to coin bad money.

(3.) [3] B is a contractor for the supply of meat to a regiment. A is B's servant, and his duty is to return the surplus meat to B, after weighing out a certain allowance to each mess. By using a short weight, A sets aside, as surplus, sixty pounds instead of fifteen pounds, intending to steal the forty-five pounds, and return the fifteen pounds to B. A's fraud is discovered before he carries the meat away. A attempts to steal the forty-five pounds as soon as he sets aside the sixty pounds.

(4.) [4] A, by false pretences as to the number of loaves he had delivered under a contract, obtains credit in account for the loaves, and would have been paid for them but for the discovery of the fraud. This is an attempt to obtain money by false pretences, as it was the last step depending on the defendant towards obtaining it.

(5.) [5] A procures indecent prints with intent to publish them. A has attempted to publish indecent prints. (*Semble.*)

(6.) [6] A goes to Birmingham to buy dies to make bad money. A has not attempted to make bad money.

(7.) [7] A having in his possession indecent prints, forms an intent to publish them. A has not attempted to publish indecent prints.

(8.) [7] A mistaking a log of wood for B, and intending to murder B, strikes the log of wood with an axe. A has not attempted to murder B

(9.) [8] A puts his hand into B's pocket with intent to steal whatever he finds there; the pocket is empty. A has not attempted to steal from B's person.

(10.) [9] A kneels down in front of a stack of corn, and lights a lucifer match, intending to set the stack on fire; but observing that he is watched, blows it out. A has attempted to set fire to the stack.

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[1] *R.* v. *Ransford*, 31 L. T. (N.S.) 488.

[2] *Roberts's Case*, Dearsley, C. C. 539.

[3] *Cheeseman's Case*, L. & C. 140.

[4] *R.* v. *Eagleton*, Dear. C. C. 515.

[5] *Dugdale* v. *R.* 1 E. & B. 435; *R.* v. *Dugdale*, Dear. C. C. 64.

[6] Per Jervis, C.J., in *Roberts's Case*, Dearsley, C. C. 551.

[7] Per Bramwell, B., in *R.* v. *McPherson*, D. & B. 201.

[8] *Collin's Case*, L. & C. 471. It is submitted, however, that he has committed an assault on B. with intent to commit a felony, Article 245 (*a*).

[9] *R.* v. *Taylor*, 1 F. & F. 511.

Article 50.

ATTEMPT—MISDEMEANOR.

Every attempt to commit an offence, whether treason, felony, or misdemeanor,[1] is a misdemeanor, unless it is otherwise specially provided for.

[1] It is difficult to put a case of an attempt to commit treason, as an overt act done with intent to commit treason would generally be treason: see the next Chapter. In the case of treasons defined in Arts. 58 and 59 there might be an attempt.

PART II.

OFFENCES AGAINST PUBLIC ORDER—INTERNAL AND EXTERNAL.

CHAP. VI.—HIGH TREASON — TREASONABLE FELONIES, AND ASSAULTS ON THE QUEEN.

CHAP. VII.— AFFRAYS — UNLAWFUL ASSEMBLIES — ROUTS — RIOTS— TUMULTUOUS PETITIONING—UNLAWFUL DRILLING.

CHAP. VIII.—OFFENCES AGAINST INTERNAL TRANQUILLITY BY UNLAWFUL ENGAGEMENTS AND COMBINATIONS AND CONFEDERACIES.

CHAP. IX. — OFFENCES AGAINST EXTERNAL PUBLIC TRANQULILITY— OFFENCES AGAINST FOREIGN NATIONS.

CHAP. X.—OFFENCES AGAINST PERSONS ON THE HIGH SEAS—PIRACY —SLAVE-TRADING.

*CHAPTER VI.

HIGH TREASON, TREASONABLE FELONIES, AND ASSAULTS ON THE QUEEN.

ARTICLE 51.

HIGH TREASON BY IMAGINING THE QUEEN'S DEATH.

[1] EVERY one commits high treason who forms and displays by any overt act, or by publishing any printing or writing, an intention to kill or destroy the Queen, or to do her any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint.

ARTICLE 52.

WHAT AMOUNTS TO IMAGINING THE QUEEN'S DEATH.

[2] Every one is deemed to have formed an intention to put

* See Note V.

[1] 25 Edw. 3, st. 5, c. 2; 36 Geo. 3, c. 7, ss. 1, 6; 57 Geo. 3, c. 6; 11 Vict. c. 12, s. 2.

[2] Foster's Discourse of H. T. ch. i. s. 5, p. 195–7; ch. ii. ss. 3, 4, 6, pp. 211–13.

the Queen to death who forms and displays by any overt act an intention

(*a.*) to depose the Queen from the exercise of her royal authority in any part of her dominions; or

(*b.*) to levy war against the Queen either in the first or in the second of the senses assigned to that expression in Article 53; or

(*c.*) to instigate any foreigner with force to invade this realm or any other of the Queen's dominions; or

(*d.*) who conspires to levy war against the Queen in the first or second, but not in the third, of the senses assigned to that expression in Article 53.

Article 53.

High treason by levying war.

[1] Every one commits high treason who levies war against the Queen in any of her dominions.

The expression "to levy war" means—

(*a.*) Attacking in the manner usual in war the Queen herself or her military forces, acting as such by her orders, in the execution of their duty;

(*b.*) Attempting by an insurrection of whatever nature by force or constraint to compel the Queen to change her measures or counsels, or to intimidate or overawe both Houses or either House of Parliament;

(*c.*) Attempting by an insurrection of whatever kind to effect any general public object.

But the expression "to levy war against the Queen" does not include any insurrection against any private person for the purpose of inflicting upon him any private wrong, even if such insurrection is conducted in a warlike manner.

[1] 25 Edw. 3, st. 5, c. 2; Foster's Discourse on H. T. ch. ii.; as to (*a*), see Foster, pp. 208 & 209; as to (*b*), see s. 3; and see 36 Geo. 3, c. 7, s. 1, which, whilst in force, was a statutory recognition of Foster's doctrine; as to (*c*), s. 4; as to the proviso, see 25 Edw. 3, st. 5, c. 2, and Foster, pp. 209–10; see also Note V.

Article 54.

HIGH TREASON BY ADHERING TO THE QUEEN'S ENEMIES.

[1] Every one commits high treason who, either in the realm or without it, actively assists a public enemy at war with the Queen. Rebels may be public enemies within the meaning of this Article.

Article 55.

ADHERENCE TO A DE FACTO KING NOT TREASON.

[2] No person who attends upon the king and sovereign lord of this land for the time being, in his person, and does him true and faithful service of allegiance in the same, or is in other places by his commandment in his wars within this land or without, is for any such act guilty of treason [even if the king *de facto* should not be king *de jure*.]

Article 56.

KILLING THE KING'S WIFE OR SON.

[3] Every one commits high treason who forms and displays by any overt act an intention

(*a*.) To kill the wife of a king regnant; or,

(*b*.) To kill that son of a king or queen regnant who is for the time being heir-apparent to the king or queen.

Article 57.

WHEN WORDS ARE TREASON.

[4] The speaking of words expressive of the intentions above mentioned is not an overt act within the meaning of Articles 51, 52, and 56.

The writing of such words is such an overt act.

The speaking or writing of words accompanied by or

[1] 25 Edw. 3, st. 5, c. 2, as explained by Hale, 1 P. C. 159–70. An officer betraying his post is a traitor at common law, though such offences are usually dealt with under martial law, see 1 Hale, 168. I suppose a deserter in the field who joins the enemy commits high treason as well as a military offence.

[2] 11 Hen. 7, c. 1; and see 6th Rep. C. L C. p. 23.

[3] 25 Edw. 3, st. 15, c. 2, as explained in 1 Hale, P. C. 124–129.

[4] Foster, 200–207.

explanatory of conduct connected with the execution of such intentions is such an act.

The speaking of words of advice, consultation, or command, or otherwise connected with the execution of such intentions, is such an act.

Article 58.

violating the king's wife, &c.

[1] Every one commits high treason who violates (whether by her own consent or not)

the wife of a king regnant; or

that daughter of the king or queen regnant who at the time is his or her eldest daughter, if she never has been married, and (perhaps) if she is a widow, and (probably) if her father or mother is alive; or

the wife of that son of a king or queen regnant who for the time being is the heir-apparent of such king or queen.

Article 59.

killing the chancellor, &c.

[2] Every one commits high treason who slays the chancellor, or the treasurer, or the king's justices of the one bench or the other, justices in eyre or justice of assize, and all other

[1] 25 Edw. 3, st. 5, c. 2, as explained by Hale.

[2] It may be permissible to suggest (as mere matter of curiosity) a doubt whether this would now apply to all the judges of the Supreme Court or only to those who are not members of the Chancery Division (25 Edw. 3, st. 5, c. 2). It is enacted by 13 Eliz. c. 2, that, every one commits high treason who uses, or puts in ure, in any place within this realm, or in any of the Queen's dominions, any bull, writing, instrument of absolution or reconciliation obtained from the Bishop of Rome to those who will be contented to forsake their due obedience to the Queen and to yield and subject themselves to the authority of the Bishop of Rome, or who willingly receives absolution or reconciliation under any such instrument. This enactment is printed in the Revised Statutes, but by 9 & 10 Vict. c. 59, it is repealed so far only as the same imposes the penalties or punishments therein mentioned. Whether the effect of this is to make the using of such bulls a treason which cannot be punished I do not know, nor does it much matter. As the 9 & 10 Vict. c. 59, further provides that the repeal of the penalty is not to make the forbidden acts lawful, it is impossible to be quite sure that doing them would not be a statutory misdemeanor. As to which see 6th Rep. C. L. C. pp. 35–41. I know not why 13 Eliz. c. 2, was not repealed simply.

justices assigned to hear and determine being in their places doing their offices.

ARTICLE 60.

PUNISHMENT FOR TREASON.

[1] Every one who is convicted of high treason must be sentenced to be hanged by the neck until he is dead; but her Majesty may (if the offender is a man) direct, by a warrant signed by one of her principal Secretaries of State, that instead thereof such offender's head shall be severed from his body whilst alive.

ARTICLE 61.

ALL PRINCIPALS IN TREASON.

[2] Every person who in the case of felony would be an accessory before the fact, is in the case of high treason a principal traitor.

ARTICLE 62.

TREASONABLE FELONIES.

[3] Every one is guilty of felony, and is liable upon conviction thereof to penal servitude for life as a maximum punishment, who [4] forms any of the intentions hereinafter mentioned, and expresses such intention either by any overt act or by publishing any printing or writing; [5] that is to say,

[1] For Common Law judgment see Chitty Crim. Law, 365–6. It was modified by 30 Geo. 3, c. 48, as to women (who before that Act were liable to be burnt alive for treason), as to men by 54 Geo. 3, c. 146, and 33 & 34 Vict. c. 23, s. 31. The odd exception made in the parenthesis arises thus: the Act 30 Geo. 3, c. 48, applies only to women, and the 54 Geo. 3, c. 146, only to men. The proviso as to beheading occurs in the second only. The Act of 1870 repeals parts of the Acts of 1790 and 1814, but does not extend to the Act of 1790 the proviso contained in the Act of 1814. It would seem, however, that the power exists at Common Law. See Foster, 269–70. The Act (31 Vict. c. 24) for executing sentence of death within gaols does not apply to cases of treason. Indeed ss. 2 and 16 together appear to exclude its operation in such cases. An execution for treason would, therefore, it would seem, have to be public. Sir E. Coke's Scriptural reasons for the punishment of treason may be seen in 3d Inst. 211.

[2] Foster, 343, and see 341–6.

[3] 11 Vict. c. 12, preamble and s. 3 (redrawn).

[4] "Shall . . . compass, imagine, invent, devise, or intend."

[5] The words "or by open advised speaking" occur in the Act, but by s. 4 it is provided that no person shall be prosecuted for offences so expressed unless the

(*a.*) An intention to depose the Queen, her heirs or successors, from the style, honour, and royal name of the Imperial Crown of the United Kingdom or of any other of her Majesty's dominions or countries; or

(*b.*) An intention to levy war against her Majesty, her heirs or successors, within any part of the United Kingdom in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe, both houses or either house of parliament; or

(*c.*) An intention to move or stir any foreigner with force to invade the United Kingdom or any other her Majesty's dominions or countries under the obeisance of her Majesty, her heirs and successors.

Article 63.

INCITING TO MUTINY.

[1] Every one commits felony, and is liable upon conviction thereof to penal servitude for life as a maximum punishment, the maximum alternative term of imprisonment being three years, who maliciously and advisedly endeavours

(*a.*) to seduce any person serving in her Majesty's forces by sea or land from his duty and allegiance to her Majesty; or

(*b.*) to incite or stir up any such person to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatever.

Article 64.

ASSAULTS ON THE QUEEN.

[2] Every one who does any of the acts hereinafter specified is guilty of a high misdemeanor, and is liable upon conviction

warrant for the offender's apprehension is issued "within two years next after the passing of the Act," i.e. before April 22, 1850. The words, I suppose, are therefore spent, although they are printed in the revised statutes.

[1] 37 Geo. 3, c. 70, s. 1. As to the punishment see 7 Wm. 4 & 1 Vict. c. 91, s. 52, s. 2, 3, (S).

[2] 5 & 6 Vict. c. 51, ss. 1, 2 (redrawn). I have omitted a few manifestly superfluous words.

thereof to be sentenced to seven years penal servitude, or to imprisonment with or without hard labour for any period not exceeding three years, and during the period of such imprisonment to be publicly or privately whipped as often (not exceeding thrice) and in such manner as the Court directs; that is to say,

(*a.*) Whoever wilfully and with intent to injure the person of the Queen or to alarm her Majesty, or to break the public peace, or so as to endanger the public peace,—

(i.) Points, aims, or presents at or near the person of the Queen any [1] firearm, loaded or not, or any other kind of arm; or

(ii.) Discharges at or near the person of the Queen any loaded arms; or

(iii.) Discharges or causes to be discharged any explosive material near the person of the Queen; or

(iv.) Strikes, or strikes at, the person of the Queen in [2] any manner whatever; or

(v.) Throws anything at or upon the person of the Queen; or

(vi.) Attempts to do any of the things specified in (ii.) (iii.), (iv.), or (v.):—

(*b.*) Whoever produces or has near the person of the Queen any [3] arm or destructive or dangerous thing with intent to use the same to injure the person of the Queen or to alarm her Majesty.

Article 65.

CONTEMPTS AGAINST THE QUEEN.

[4] Every one commits a misdemeanor who is guilty of any contempt against the person of her Majesty, or her royal

[1] "Any gun, pistol, or any other description of firearms, or of other arms whatsoever."

[2] "With any offensive weapon or in any other."

[3] "Any gun, pistol, or any other description of firearms, or of other arms whatsoever."

[4] I have taken the words of the 7th Rep. C. C. L. Art 2, founded on Hawkins, P. C. bk. I. ch. vi., which contains much obsolete and even more indefinite and undefinable matter. See, too, 6th Rep. C. C. Art. 44, and note. Hawkins treats contempts against the judges of the King's Courts under this head. Contempt of Court seems to me hardly to be a branch of the criminal law.

dignity, by means of any contumelious, insulting, or disparaging words, acts, or gestures.

Article 66.

SOLEMNIZING OR ASSISTING AT MARRIAGE OF A MEMBER OF THE ROYAL FAMILY.

[1]Every person commits a misdemeanor who knowingly or wilfully presumes to solemnize, or to assist, or to be present at the celebration of any marriage of any descendant of the body of King George the Second, male or female (other than the issue of princesses married into foreign families), or at his or her making any matrimonial contract without the consent specified in 12 Geo. 3, c. 11.

Every person committing such a misdemeanor is put out of the Queen's protection. His lands, tenements, goods, and chattels are forfeited to the Queen, and he is to be imprisoned for life (perhaps, at the Queen's pleasure).

[1] 12 Geo. 3, c. 11. The punishment is præmunire, as explained by Coke, 1 Inst. 130 a; see 7th Rep. C. C. L. p. 37.

CHAPTER VII.

AFFRAYS, UNLAWFUL ASSEMBLIES, ROUTS, RIOTS, TUMULTUOUS PETITIONING AND UNLAWFUL DRILLING.

ARTICLE 67.

SENDING CHALLENGES AND PROVOKING TO FIGHT.

EVERY one commits a misdemeanor who

(*a.*) [1] Challenges any other person to fight a duel; or,

(*b.*) [2] Endeavours by words, or by writings, to provoke any other person to challenge the offender or to commit a breach of the peace.

ARTICLE 68.

GOING ARMED SO AS TO CAUSE FEAR.

[3] Every one commits a misdemeanor who goes armed in public, without lawful occasion, in such a manner as to alarm the public.

ARTICLE 69.

AFFRAY.

[4] An affray is the fighting of two or more persons in a public place to the terror of her Majesty's subjects. Every affray is a misdemeanor.

ARTICLE 70.

UNLAWFUL ASSEMBLY.

[5] An unlawful assembly is an assembly of three or more persons:—

(*a.*) With intent to commit a crime by open force; or,

[1] 3 Inst. 158; 1 Russ. Cr. 418.

[2] *R.* v. *Philips*, 6 East, 463. It appears from the judgment in this case (pp. 470–5) that the offence defined in clause (*b*) is only a special illustration of the general law as to incitement.

[3] 2 Edw. 3, c. 3, paraphrased with reference to the explanations given in 1 Hawk. P. C. 488–9.

[4] 3 Inst. 158; 1 Russ. Cr. 406.

[5] Brooke's Abt. "Riot;" Viner's Abt. "Riot;" Lambarde, ch. v. 172–184; Dalton, p. 310–14; 1 Hawk. P. C. 513–16.

(*b.*) With intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it.

Every unlawful assembly is a misdemeanor.

Illustrations.

(*a.*) [1] Sixteen persons meet for the purpose of going out to commit the offence of being by night, unlawfully, upon land, armed in pursuit of game. This is an unlawful assembly.

(*b.*) [2] A, B, and C meet for the purpose of concerting an indictable fraud. This, though a conspiracy, is not an unlawful assembly.

(*c.*) [3] A, B, and C having met for a lawful purpose, quarrel and fight. This (though an affray) in not an unlawful assembly.

(*d.*) [4] A large number of persons hold a meeting to consider a petition to parliament lawful in itself; but they assemble in such numbers, with such a show of force and organization, and when assembled make use of such language as to lead persons of ordinary firmness and courage in the neighbourhood to apprehend a breach of the peace. This is an unlawful assembly.

Article 71.

ROUTS.

[5] A rout is an unlawful assembly which has made a motion towards the execution of the common purpose of the persons assembled.

Article 72.

RIOTS.

[5] A riot is an unlawful assembly which has actually begun to execute the purpose for which it assembled, by a breach of the peace, and to the terror of the public; or

[6] A lawful assembly may become a riot if the persons assembled form and proceed to execute an unlawful purpose

[1] *R.* v. *Brodribb*, 6 C. & P. 571. The meeting in this case was in a private house.

[2] (Submitted). Compare 1 Hawk. P. C. 515.

[3] 1 Hawk. P. C. 514.

[4] *Redford* v. *Birley*, 3 Starkie, N. P. 107–8; *R.* v. *Vincent*, 9 C. & P. 91.

[5] See note to Article 70.

[6] Founded on the language of Holt, C.J., in *R.* v. *Soley*, 11 Modern, 116

to the terror of the people, although they had not that purpose when they assembled.

[1] Every person convicted of riot is liable to be sentenced to hard labour.

Illustration.

A, B, and C met at A's house for the purpose of beating D, who lives a mile off. They then go together to D and there beat him. At A's house the meeting is an unlawful assembly, on the road it is a rout, and when the attack is made upon D it is a riot.

Article 73.

Preventing reading proclamation and continuing to riot after proclamation.

[2] Whenever twelve persons or more are unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace [3] it is the duty of the justices of the peace, and the sheriff, and under-sheriff of the county, or of the mayor, bailiffs, or other head officers, or justices of the peace of a city or town corporate, to resort to the place where such assembly is, and among the rioters, or as near to them as the person making the proclamation can safely come, with a loud voice command or cause to be commanded silence to be, and then openly and with loud voice make or cause to be made a proclamation [4] in these words or like in effect:

"Our Sovereign Lady the Queen chargeth and com-
"mandeth all persons being assembled immediately to dis-
"perse themselves, and peaceably to depart to their habita-
"tions, or to their lawful business, upon the pains contained
"in the Act made in the first year of King George for
"preventing tumultuous and riotous assemblies. God save
"the Queen."

All persons commit felony, and are liable to [5] penal servi-

[1] 3 Geo. 4, c. 114.

[2] 1 Geo. 1, st. 2, c. 5, ss. 1, 2, 3 (redrawn).

[3] Actual riot is not necessary. *R.* v. *James*, 5 C. & P. 153.

[4] The omission of "God save the Queen" defeats the effect of the proclamation. *R.* v. *Child*, 4 C. & P. 442.

[5] Substituted for death by 7 Wm. 4 & 1 Vict. c. 91, s. 1, and the Penal Servitude Acts. S.

tude for life as a maximum punishment, with a maximum alternative term of three years imprisonment, and hard labour, who

(*a.*) [1] Wilfully and knowingly oppose, obstruct, let, hinder, or hurt, any person who begins to make, or goes to make, the said proclamation, whereby such proclamation is not made, or

(*b.*) [2] Who remain, or continue together unlawfully, riotously, and tumultuously, for one hour, after the proclamation aforesaid, was made; or if they know that its making was hindered, for one hour after it would have been made if it had not been hindered as aforesaid.

Article 74.

Riotous demolition of houses, &c.

[3] All persons are guilty of felony, and are liable to penal servitude for life, as a maximum punishment, who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolish, or pull down, or destroy, any building, public building, machinery, or mining plant, as defined in the note hereto, [4] or begin to do so.

[1] Sect. 5.

[2] 1 Geo. 1, st. 2, c. 5, ss. 1 and 5 (redrawn).

[3] 24 & 25 Vict. c. 97, s. 11 (redrawn). S.

[4] "Building" means any church, chapel, meeting-house, or other place of divine worship, house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, fold, and any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof.

"Public building" means any building other than those above mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish or place, university, college, or hall of any university, or inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution.

"Machinery" means any machinery, whether fixed or movable, prepared for, or employed in, any manufacture, or in any branch thereof.

"Mining plant" means any steam-engine, or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine.

ARTICLE 75.

RIOTOUS DAMAGE OF HOUSES, &c.

[1]All persons are guilty of a misdemeanor, and liable to seven years penal servitude, as a maximum punishment, who being so assembled as aforesaid unlawfully and with force injure or damage any of the things aforesaid.

ARTICLE 76.

PERSONS ASSEMBLED IN ORDER TO SMUGGLE.

[2]Every one commits a misdemeanor, and is liable to a fine of not more than £500, and not less than £100, who with any two other persons assembles for [3], or having so

[1] 24 & 25 Vict. c. 97, s. 12 (redrawn).

[2] 39 & 40 Vict. c. 36, ss. 188, 9. These sections are obscure in some points. I believe them to mean what is stated in the text. The first part of the article gives the effect of s. 188 with only a slight change in the order of the words. The second part is what I suppose to be the meaning of s. 189. That section begins by providing that every one who procures or hires any person to assemble for the purposes specified in the 3rd paragraph of the article in the text, is to be imprisoned for the term mentioned. It then proceeds to enact that if any person "*engaged in the commission of any of the above offences*" is armed, or disguised, &c., he is to be imprisoned for a term not exceeding three years. "The above offences" can hardly mean the offences mentioned in the earlier part of the section, as a man hiring another to run goods would hardly be likely to be armed or disguised, nor would it make matters worse if he were. I suppose, therefore, the "above offences" are the offences specified in s. 188, though the words may probably refer also to numerous revenue offences created by s. 186. This, however, raises new difficulties. Upon this view the latter part of s. 189 enacts that a person is to be imprisoned if, forming one of an assembly of three people for smuggling purposes, he is (1) armed, (2) disguised, (3) armed and in possession of smuggled goods within five miles of the coast, &c., (4) disguised and in possession of smuggled goods, &c. It is impossible for any one to commit (3) or (4), unless he has already committed either (1) or (2). Why, then, should any special punishment be provided for him? It is like enacting that every man who steals a sheep shall be liable to penal servitude, and then enacting separately that if he steals it on a road or in a field he shall be liable to the same punishment. I rather think the intention must have been to provide for the case of a person found alone in possession of smuggled goods near the coast, and armed or disguised, and that by a slip in the drafting some such words as "or if any person whatever" were left out before the words "so armed or disguised." A comparison of this provision with s. 250 of the repealed Act strengthens this conjecture. In that enactment an assembly of five persons for the purposes mentioned formed one offence, and an assembly of two persons formed another. There must be some mistake in the drafting, as there is no nominative case to the verb "shall be imprisoned."

[3] So in the Act. Perhaps "for" ought to be "in order to".

assembled, does unship, land, run, carry, convey, or conceal any spirits, tobacco, or prohibited, restricted, or uncustomed goods.

If any person engaged in any of the said offences is armed with firearms or other offensive weapons, or, whether so armed or not, is disguised in any way, or being so armed or disguised is found within five miles of the sea coast or of any tidal river with any goods liable to forfeiture under the 39 & 40 Vict. c. 36, or any other Act relating to the Customs, he must be imprisoned with or without hard labour for a term not exceeding three years.

Every one must be imprisoned for a term not exceeding twelve months who procures, or hires, or deputes, or authorizes any other person to procure or hire any person or persons to assemble for the purpose of being concerned in the landing or unshipping, or carrying, conveying, or concealing any goods which are prohibited to be imported, or the duties for which have not been paid or secured.

Article 77.

THREE PERSONS ARMED IN PURSUIT OF GAME BY NIGHT.

[1] Every one commits a misdemeanor, and is liable, upon conviction thereof, to a maximum punishment of fourteen years penal servitude and a maximum alternative term of three years hard labour,

who, with two or more other persons together, between the end of the first hour after sunset and the beginning of the last hour before sunrise, unlawfully enters or is on any land, whether open or enclosed, for the purpose of taking or destroying hares, pheasants, grouse, heath or moor game, black game, bustards, or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or other offensive weapon.

[1] 9 Geo. 4, c. 69, s. 12. The words "night" and "game," which occur in the section, are explained to the effect given in the text by ss. 12 and 13. The statute appears to be intended rather to prevent the murderous conflicts which are the frequent and natural results of the offence punished than to protect game. I have accordingly introduced it here.

ARTICLE 78.

RIOTOUSLY PREVENTING THE SAILING OF SHIP.

[1] All [2] persons are guilty of misdemeanor, and are liable upon conviction thereof to a maximum term of twelve months, and a minimum term of six months hard labour, who being riotously assembled together to the number of three or more, unlawfully and with force prevent, hinder, or obstruct the loading or unloading, or the sailing or navigating of any [3] vessel, or unlawfully and with force board any [3] vessel with intent to do so.

Every person who commits any of the offences aforesaid after a previous conviction for any such offence is guilty of felony, and is liable upon conviction thereof to a maximum punishment of fourteen years penal servitude.

ARTICLE 79.

FORCIBLE ENTRY AND DETAINER.

[4] Every one commits the misdemeanor called a forcible entry, who, in order to take possession thereof, enters upon any lands or tenements in a violent manner, whether such violence consists in actual force applied to any other person or in threats, or in breaking open any house, or in collecting together an unusual number of persons for the purpose of making such entry.

It is immaterial whether the person making such an entry had or had not a right to enter, provided that a person who enters upon land or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry.

[1] 33 Geo. 3, c. 67.

[2] Seaman, keelman, caster, ship carpenter, or other person.

[3] Ship, keel, or other vessel.

[4] 1 Russ. Cr. 421–434; 1 Hawk. P. C. 495–512. There are many statutes in force on the subject, viz., 5 Ric. 2, st. 1, c. 7 (8 in common editions); 15 Ric. 2, c. 2; 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Ja. 1, c. 15. These statutes give no definition of the offence, but provide a mode of procedure for giving possession to the party forcibly dispossessed. It is curious to compare these provisions with the Indian Code of Criminal Procedure, Act X. of 1872, c. 40. See on forcible entry, *Low* v. *Telford*, L. R. 1 App. Cas. 414.

Every one commits the misdemeanor called a forcible detainer who, having wrongfully entered upon any lands or tenements, detains such lands and tenements in a manner which would render an entry upon them for the purpose of taking possession forcible.

Article 80.

POLITICAL MEETINGS IN WESTMINSTER.

[1] Every meeting is an unlawful assembly which consists of more than fifty persons, and is held in any street, square, or open place in the city or liberties of Westminster, or county of Middlesex, within a mile from the gate of Westminster Hall, and out of the parish of St. Paul's, Covent Garden, for the purpose, or on the pretext of, considering of or preparing any petition or address to the Queen, or to both Houses, or either House of Parliament, for alteration of matters in Church or State, on any day on which either House of Parliament meets, sits, or is summoned or adjourned, or prorogued to meet or sit, or on which the [2] High Court of Judicature, or any division or judge thereof, sits at Westminster Hall: Provided, that this does not extend to any meeting held for the election of members of parliament, or to persons attending upon the business of either House of Parliament, or the said Court, or any of its divisions or judges.

Every person who convenes or calls together, or gives any notice for convening or calling together any such meeting commits a misdemeanor.

Article 81.

PROCURING SIGNATURES TO PETITION WITHOUT AUTHORITY AND TUMULTUOUS PETITIONING.

[3] Every one commits a misdemeanor, and is liable, upon conviction thereof, to a penalty not exceeding the sum of £100 in money, and three months imprisonment,

(*a.*) who solicits, labours, or procures the getting of hands

[1] 57 Geo. 3, c. 19, s. 23.

[2] "His Majesty's Courts of Chancery, King's Bench, Common Pleas, and Exchequer, or any of them, or any judge of any of them," &c.

[3] 13 Car. 2, c. 5.

or other consent of more than twenty persons to any petition or address to the Queen, or to either House, or both Houses of Parliament, for alteration of matters established by law in Church or State, unless the matter of the petition or address has been first consented to and ordered by three or more justices of the county where the matter arises, or by the major part of the grand jury at the assizes or quarter sessions, or in London by the lord mayor, aldermen, and commons, in common council assembled.

(*b.*) who repairs to the Queen or either Houses of Parliament upon pretence of presenting any petition or address accompanied by more than ten persons at any one time.

Article 82.

UNLAWFUL DRILLING.

[1] All assemblies are unlawful which are held in order that the persons assembled may train or drill themselves, or be trained or drilled to the use of arms, or for the purpose of practising military movements or evolutions without lawful authority.

Every person commits felony, and is liable upon conviction thereof to a [2] maximum punishment of seven years penal servitude, who

(*a*) is present at, or attends any such assembly, for the purpose of training or drilling any other person to the use of arms, or the practice of military exercise, movements, or or evolutions, or

(*b.*) who trains or drills any other person to the use of arms, or the practice of military exercise, movements, or evolutions, or

(*c*) who aids or assists therein.

Every person commits a misdemeanor, and is liable upon conviction thereof to a maximum punishment of two years imprisonment and fine, who attends or is present at any such assembly for the purpose of being, or who at any such assembly is, trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions.

[1] 60 Geo. 3 & 1 Geo. 4, c. 1, s. 1 (redrawn).

[2] There is no provision for hard labour in case of imprisonment.

CHAPTER VIII.

OFFENCES AGAINST INTERNAL TRANQUILLITY BY UNLAWFUL ENGAGEMENTS AND COMBINATIONS AND CONFEDERACIES.

ARTICLE 83.

UNLAWFUL OATHS. OATHS TO COMMIT MURDER OR TREASON.

[1]EVERY one is guilty of felony, and liable to penal servitude for life, as a maximum punishment, the maximum alternative term of imprisonment being in case (*a*) three years, who

(*a.*) Administers, or causes to be administered, or aids or assists at the administering of any oath, engagement, or obligation in the nature of an oath, purporting, or intending to bind the person taking the same to commit treason or murder, or any felony which on the 12th of July, 1812, was punishable with death; or

(*b.*) Takes any such oath or engagement, not being compelled thereto.

ARTICLE. 84.

OTHER UNLAWFUL OATHS.

[2]Every one is guilty of felony, and is liable, upon conviction, to seven years penal servitude as a maximum and five years penal servitude as a minimum punishment, who

(*a.*) Administers, or causes to be administered, or is aiding and assisting at, or present at and consenting to the

[1] 52 Geo. 3, c. 104, ss. 1, 6 (redrawn). As to punishment see in case (*a*) 7 Wm. 4 & 1 Vict. c. 91, S.

[2] 37 Geo. 3, c. 123, ss. 1, 5 (redrawn). The punishment is transportation for any term not exceeding seven years, and no alternative term of imprisonment is given. The 9 & 10 Vict. c. 24, s. 1, applies only to cases in which a sentence of more than seven years transportation may be given. It does not therefore apply to this case. By the penal servitude statutes, penal servitude is substituted for transportation, and five years is now the minimum term for which penal servitude can be inflicted. The result would, I suppose, be as stated in the text.

administering or taking of any oath, or engagement, or obligation in the nature of an oath, purporting or intending to bind the person taking the same—

(i.) To engage in any mutinous or seditious purpose;

(ii.) To disturb the public peace;

(iii.) To be of any association, society, or confederacy formed for any such purpose;

(iv.) To obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose;

(v.) Not to inform or give evidence against any associate, confederate, or other person;

(vi.) Not to reveal or discover any unlawful combination or confederacy, or any illegal act done or to be done; or any illegal oath or engagement which may have been administered or tendered to, or taken by [1]any person, or the import of any such oath or engagement; or who

(*b.*) Takes any such oath or engagement, not being compelled thereto.

Article 85.

COMPULSION, HOW FAR A DEFENCE.

[2]No person who takes any oath or engagement referred to in Article 83 or Article 84, under compulsion, shall be justified or excused thereby, unless within fourteen days after the taking thereof in the case of oaths referred to in Article 83, or within four days after the taking thereof in the case of oaths referred to in Article 84, if not prevented by actual force or sickness, and then within four days after the cessation of the hindrance produced by such force or sickness, he declares the same, and the whole of what he knows touching the same, and the persons by whom, and in whose presence, and when and where such oath or engagement was administered or taken, by information on oath before one of her Majesty's justices of the peace, or one of her Majesty's prin-

[1] "Such person or persons, or to or by any other person or persons."

[2] 52 Geo. 3, c. 104, s. 2; 37 Geo. 3, c. 123, s. 2 (consolidated).

cipal secretaries of state, or her Majesty's Privy Council; or if he is in in actual service in her Majesty's forces by sea or land, either by such information on oath as aforesaid, or by information to his commanding officer.

Article 86.

UNLAWFUL CLUBS AND SOCIETIES.

[1]Every club or society is an unlawful combination and confederacy:

(*a.*) If its members according to its rules, or according to any provision or agreement for that purpose, are required, or permitted to, or do take any unlawful oath or undertaking as defined in Articles 83 and 84, or any oath not required or authorized by law; or

(*b.*) Take or in any manner bind themselves by any such oath or agreement on becoming or in consequence of being members of any such society; or

(*c.*) [2]Take, subscribe, or assent to any test or declaration not required or authorized by law or allowed in the manner mentioned in the note hereto, whether by words, signs, or otherwise, either in order to become or in consequence of being a member of such society or club; or

[1] (*a.*) to (*h.*) inclusive, 39 Geo. 3, c. 79, s. 2; (*c.*) is repeated in and extended by 57 Geo. 3, c. 19, s. 25; (*i.*) and (*j.*), 57 Geo. 3, c. 19, ss. 24, 25. The preamble of 39 Geo. 3, c. 79, recites the existence of a treasonable conspiracy carried on both in Great Britain and Ireland in order to overturn the government, and that in pursuance of this design societies have been instituted, "inconsistent with the existence of regular government," and in particular, societies of United Englishmen, United Irishmen, and United Scotsmen, United Britons, and the London Corresponding Societies. It then describes the proceedings of these societies; and section 1 enacts that they shall be "utterly suppressed and prohibited" as "unlawful combinations and confederacies." Section 2 contains the provisions embodied in the text. Section 1 can hardly be regarded as creating a distinct offence, as the societies which are suppressed no longer exist. It would however make it penal to revive those societies or similar ones.

[2] The form of the test must be approved and subscribed by two or more justices of the peace of the county, and registered with the clerk of the peace. Such approbation is valid only till the next general session for the county, unless on application made by the parties concerned, it is then confirmed by the majority of the justices present. Sect. 3.

(*d.*) If the names of the members, or any of them, are kept secret from the society at large; or

(*e.*) [1]If there is any committee or select body so chosen or appointed that the members constituting the same are not known by the society at large to be members of such committee or select body; or

(*f.*) If there is any president, secretary, delegate, or other officer so chosen or appointed that his election or appointment to such office is not known to the society at large; or

(*g.*) If the names of all the members, and of all committees or select bodies of members, and of all presidents, treasurers, secretaries, delegates, and other officers, are not entered in a book or books to be kept for that purpose, and to be open to the inspection of all the members of such society; or

(*h.*) If the society is composed of different divisions or branches, or of different parts acting in any manner separately or distinct from each other, or of which any part has any separate or distinct president, secretary, treasurer, delegate, or other officer elected or appointed by or for such part, or to act as an officer for such part; or

(*i.*) If the society elects, appoints, nominates, or employs any committee, delegate, representative, or missionary to meet or communicate with any other society or club, or with any committee, delegate, representative, or missionary of any other society or club, or to induce or persuade any person to become a member thereof; or

(*j.*) [2]If the society professes for its object the confiscation and division of land, and the extinction of the funded property of the kingdom.

[1] In the Act it is "shall be any committee so instituted that the same shall not be known," &c. I suppose the two "shalls" are put in for the sake of the grammar only, but the second "shall" may possibly indicate that an intention to conceal the names is required as well as the mere fact of concealment.

[2] In the 57 Geo. 3, c. 19, reference is made by name to the Spenceans, or Spencean Philanthropists, analogous to the reference in 39 Geo. 3, c. 79, to the United Englishmen, &c.

Article 87.

QUAKERS AND RELIGIOUS AND CHARITABLE SOCIETIES EXCEPTED.

[1]The provisions of Article 86 do not extend to any meeting or society of Quakers, or to any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business is treated of or discussed, or to any lodge of freemasons, two members of which certify on oath in the manner prescribed in 39 Geo. 3, c. 79, s. 6.

Article 88.

PUNISHMENT OF MEMBERS.

[2]Every member of any such society, and every person who acts as a member thereof, or directly or indirectly maintains correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, treasurer, secretary, delegate, or other officer or member thereof as such, or aids, abets, or supports any such society by contribution of money or otherwise, is liable, upon summary conviction, to be imprisoned for not more than three months, or less than one month, or to be fined not more than £20, and not less than £6. 6*s.* 8*d.*, and in default of payment to be imprisoned for any term not exceeding three months, or if convicted on indictment, to a maximum punishment of seven years penal servitude, or two years imprisonment without hard labour.

Article 89.

PERMITTING MEETINGS OF UNLAWFUL CLUBS.

[3]Whoever knowingly permits any meeting of any club or society, or any division, committee, or branch of a club or society declared by Article 86 to be unlawful, to be held in any house or place belonging to him or in his occupation, is liable to a penalty of £5 for the first offence, and for every

[1] 57 Geo. 3, c. 19, ss. 26, 27; 39 Geo. 3, c. 79, s. 5.
[2] 39 Geo. 3, c. 79, ss. 8, 9; 57 Geo. 3, c. 19, s. 25.
[3] 57 Geo. 3, c. 19, s. 28; 39 Geo. 3, c. 79, s. 13.

subsequent offence is deemed to be guilty of an unlawful combination and confederacy, and is liable to the penalties specified in Article 88.

Article 90.

JESUITS AND MONKS.

[1] Every Jesuit, and every member of any other religious order, community, or society of the Church of Rome bound by monastic or religious vows who comes into this realm, commits a misdemeanor, and is liable upon conviction thereof to be banished from the United Kingdom for the term of his natural life,

[2] provided that the Secretary of State, being a Protestant, may grant a licence to any such person to come into the United Kingdom and to remain there for a period not exceeding six months; and any Secretary of State may revoke such licence before the expiration of the time mentioned therein. If the licensee does not depart from the United Kingdom within twenty days after the time mentioned in the licence, or after notice of revocation thereof, he commits a misdemeanor, and is liable to be banished from the United Kingdom for life.

[3] Every such person commits a misdemeanor, who, within any part of the United Kingdom, admits any person to become a regular ecclesiastic, or brother or member of any such religious order, community, or society, or aids or consents thereto, or administers or causes to be administered, or aids or assists in administering, any vow or engagement purporting or intended to bind the persons taking the same to the rules, ordinances, or ceremonies of such religious order, community, or society.

[4] Every person commits a misdemeanor and must be banished from the United Kingdom for life who within any part of the United Kingdom is admitted or becomes a Jesuit

[1] 10 Geo. 4, c. 7, ss. 28, 29.
[2] 10 Geo. 4, c. 7, s. 31.
[3] Ibid. s. 32.
[4] Ibid. s. 34.

of brother or member of any other such religious order or community aforesaid.

[1] Every person ordered to be banished who does not depart from the United Kingdom within thirty days may be removed to such place as Her Majesty, by the advice of her Privy Council, directs.

[2] Every person ordered to be banished who is found at large in the United Kingdom after three months from such order, is liable to penal servitude for life as a maximum punishment.

[3] Nothing in this article contained affects any religious order, community, or establishment consisting of females bound by religious or monastic vows.

Article 91.

SEDITIOUS WORDS AND LIBELS.

[4] Every one commits a misdemeanor who publishes verbally or otherwise any words or any document with a seditious intention. If the matter so published consists of words spoken the offence is called the speaking of seditious words. If the matter so published is contained in any thing capable of being a libel, the offence is called the publication of a seditious libel.

The word "publish" in this article is used in the same sense as in Article 270, and the word "libel" in the second of the two senses specified in Article 267.

Article 92.

SEDITIOUS CONSPIRACY.

[5] Every one commits a misdemeanor who agrees with any other person or persons to do any act for the furtherance of any seditious intention common to both or all of them. Such an offence is called a seditious conspiracy.

[1] 10 Geo. 4, c. 7, s. 35.
[2] Ibid. s. 36.
[3] Ibid. s. 37.
[4] 1 Hawk. P. C. 66, 486; 4 Steph. Com. 238; 1 Russ. Cr. 336, and see Note VI.
[5] See Wright on the Law of Conspiracy, 28–31.

ARTICLE 93.

SEDITIOUS INTENTION DEFINED.

[1]A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of her Majesty, her heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst her Majesty's subjects, or to promote feelings of ill will and hostility between different classes of such subjects.

[2]An intention to shew that her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce feelings of hatred and ill-will between classes of her Majesty's subjects, is not a seditious intention.

ARTICLE 94.

PRESUMPTION AS TO INTENTION.

[3]In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

[1] 60 Geo. 3 & 1 Geo. 4, c. 8; and *O'Connell* v. *R.*, 11 Cl. & F. 155, 234.
[2] *R.* v. *Lambert and Perry*, 2 Camp. 398; *R.* v. *Vincent*, 9 C. & P. 91.
[3] *R.* v. *Burdett*, 4 B. & A. 95; *R.* v. *Harvey*, 2 B. & C. 257.

Article 95.

SPREADING FALSE NEWS.

[1] Every one commits a misdemeanor who cites or publishes any false news or tales whereby discord or occasion of discord or slander may grow between the Queen and her people or the great men of the realm ([2] or which may produce other mischiefs).

[1] 3 Edw. 1, c. 34.

[2] See Starkie on Slander by Folkard, 670–2. The definition is very vague and the doctrine exceedingly doubtful.

CHAPTER IX.

OFFENCES AGAINST EXTERNAL PUBLIC TRANQUILLITY.

OFFENCES AGAINST FOREIGN NATIONS.

ARTICLE 96.

VIOLATION OF AMBASSADORS' PRIVILEGES.

[1]Every one is guilty of a misdemeanor who, by force or personal restraint, violates any privilege conferred upon the diplomatic representatives of foreign countries by the law of nations, as collected by her Majesty's Courts from the practice of different nations, and the authority of writers thereon.

ARTICLE 97.

ARREST OF AMBASSADORS.

[2]Every one commits a misdemeanor who sets forth or prosecutes or executes any writ or process whereby is arrested or imprisoned the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by her Majesty, or any domestic servant of any such ambassador or minister, registered as such in the office of a principal secretary of state, or in the office of the sheriff of London and Middlesex.

ARTICLE 98.

PUNISHMENT.

[2]Every person who commits the offence defined in Article 97, is liable to such pains, penalties, and corporal punishment as the Lord Chancellor, the Lord Chief Justice of England, and the Lord Chief Justice of the Common Pleas, or any two of them, shall judge fit to be imposed and inflicted.

[1] *Triquet and Others* v. *Bath*, 3 Burr. 1481. As to what constitutes authority on a question of international law, see *R.* v. *Keyn*, L. R. 2 Ex. D. 63.

[2] 7 Anne, c. 12, ss. 3, 4, 6.

ARTICLE 99.

LIBELS ON FOREIGN POWERS.

[1] Every one is guilty of a misdemeanor who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador or other foreign dignitary, with intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs.

The word "publish" is used here in the same sense as in Article 270, and the word "libel" in the second of the two senses specified in Article 267.

(SUBMITTED.) Nothing is an offence against this Article which is a fair criticism on a matter of public interest as defined in Article 274.

ARTICLE 100.

INTERFERENCE IN FOREIGN HOSTILITIES.

[2] Every person commits a misdemeanor, and is liable upon conviction thereof to fine and imprisonment with or without hard labour, or either of such punishments, at the discretion of the Court, who does any of the following acts [3] without the licence of her Majesty under her sign manual, or signified by Order in Council, or by proclamation, that is to say—

(*a.*) [4] Who, within the limits of Her Majesty's dominions prepares or fits out any naval or military expedition to proceed against the dominions of any [5] friendly state, or

[1] *R.* v. *D'Eon*, 1 Blac. 510; *R.* v. *Lord G. Gordon*, 22 St. Tr. 213–233. (This was the case of a libel on Marie Antoinette seven years after the defendant's acquittal for high treason.) *R.* v. *Vint* (1801). Vint wrote of the Emperor Paul, "The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency." Starkie (by Folkard), 669. *R.* v. *Peltier*, 28 State Trials, 529; 6th Rep. C. L. Com. art. 50, p. 34.

[2] 33 & 34 Vict. c. 90 (redrawn).

[3] Sect. 15.

[4] Sect. 11.

[5] "Friendly state" means "any foreign state at peace with Her Majesty" (sect. 4).

is engaged in such preparation or fitting-out, or assists therein, or is employed in any capacity in such expedition; or

(*b.*) [1] Who, being a British subject, within or without her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state, or, whether a British subject or not, within her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid; or

(*c.*) [2] Who, being a British subject, quits or goes on board any ship with a view of quitting her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting her Majesty's dominions with the like intent; or

(*d.*) [3] Who, being the master or owner of any ship, knowingly either takes on board, or engages to take on board, or has on board such ship within her Majesty's dominions any illegally enlisted person; as defined in Article 101; or

(*e.*) [4] Who, within her Majesty's dominions, with intent or knowledge, or having reasonable cause to believe that the same will be employed in the military or naval service of any foreign state at war with any friendly state,

Builds, agrees to build, causes to be built, equips, despatches, or causes or allows to be despatched, any ship or issues or delivers any commission for any ship,

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, is not liable to any of the penalties specified in this article in respect of such building or equipping—

(i.) If forthwith upon a proclamation of neutrality being

[1] 33 & 34 Vict. c. 90, s. 4.
[2] Sect. 5.
[3] Sect. 7.
[4] Sect. 8 (redrawn).

issued by her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State; and

(ii.) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered or removed without the license of her Majesty until the termination of such war as aforesaid.

Article 101.

SHIPS, &c., REFERRED TO IN ARTICLE 100 TO BE FORFEITED.

[1]All ships and their equipments used in or forming part of any such expedition as is mentioned in Article 100 (*a*), or in respect of which is committed any of the offences defined in Article 100 (*e*), and all arms and munitions of war used in or forming part of any such expedition as is mentioned in Article 100 (*a*), are forfeited to her Majesty.

The expression "illegally enlisted persons" in Article 100 (*d*), means—

(i.) Any person who, being a British subject, within or without the dominions of her Majesty, has, without the license of her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state;

(ii.) Any person, being a British subject, who, without the license of her Majesty, is about to quit her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state;

(iii.) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any

[1] See section referred to in the Articles mentioned.

commission or engagement in the military or naval service of any foreign state at war with a friendly state;

Every ship referred to in Article 100 (*d*) is to be detained until the trial and conviction or acquittal of the master or owner and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace; and

All illegally enlisted persons must, immediately on the discovery of the offence, be taken on shore, and must not be allowed to return to the ship.

Article 102.

INCREASING FORCE OF SHIPS FOR FOREIGN BELLIGERENTS, AND PROCURING ENLISTMENT BY MISREPRESENTATION.

Every person is guilty of a misdemeanor and is liable upon conviction thereof to the punishment specified in the last article who

(*a.*) [1] Within the dominions of her Majesty and without such licence as is mentioned in Article 100, by adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of her Majesty was a ship in the military or naval service of any foreign state at war with any friendly state; or

(*b.*) [2] Who induces any other person to quit her Majesty's dominions or to embark on any ship within her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state.

[1] 33 & 34 Vict. c. 90, s. 10. [2] Sect. 6.

Article 103.

PRESUMPTION OF KNOWLEDGE OF PURPOSE FOR WHICH SHIP IS BUILT.

[1] Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship must, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state lies on the builder of such ship.

[1] 33 & 34 Vict. c. 90, s. 9.

CHAPTER X.

OFFENCES AGAINST PERSONS ON THE HIGH SEAS—PIRACY—SLAVE-TRADING.

ARTICLE 104.

PIRACY.

[1] Piracy by the law of nations is,

Taking a ship on the high seas or within the jurisdiction of the Lord High Admiral from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself, or any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the act had been done within the body of an English county.

Whoever commits piracy by the law of nations is liable (it seems) to the same punishment as if the act constituting piracy had been committed within the body of an English county.

It is doubtful whether persons cruising in armed vessels, with intent to commit piracies, are pirates or not.

[1] The definition is founded on one given by Sir Charles Hedges, in *R.* v. *Dawson*, 13 St. Tr. 454, and recognised by the Judicial Committee of the Privy Council in *A. G. of Hong Kong* v. *Kwok-a-sing*, L. R. 5 P. C. 179, 199; see, too, 7th Rep. C. L. C. p. 70. As to the punishment, the text gives what I suppose is the result of 28 Hen. 8, c. 15, ss. 2 & 3; 39 Geo. 3, c. 37, s. 1; 1 Geo. 4, c. 90, s. 1; 7 & 8 Geo. 4, c. 28, s. 12. The doubt expressed at the end of the Article is founded on the absence of any express authority for the affirmative of the proposition, and on the absurdity of the negative. If a Queen's ship were to fall in with an armed vessel belonging to no state, and obviously cruising for piratical purposes, would the commanding officer hesitate to seize that vessel because it had not actually taken any prize? It seems equally difficult to suppose that the vessel would be permitted to escape, or that it could lawfully be arrested if the crew were not pirates. The language of several of the statutes given in Articles 108, 109, and 110, seems to imply that a pirate is the name of a known class of persons, like a soldier or sailor, and that a man may be a pirate though he has never actually robbed, as he may be a soldier though he has not actually fought.

Article 105.

PIRACY WITH VIOLENCE.

[1] Every one commits felony and must upon conviction thereof be sentenced to [2] death who, with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, assaults with intent to murder any person on board of or belonging to such ship or vessel, or stabs, cuts, or wounds any such person, or unlawfully does any act by which the life of such person may be endangered.

Article 106.

COMMITTING ACTS OF HOSTILITY UNDER FOREIGN COMMISSION.

[3] Every one is deemed to be a pirate who, being a natural-born subject of her Majesty, or denizen of this kingdom, commits any piracy, robbery, or act of hostility against others her Majesty's subjects on the sea under colour of any commission from any foreign prince or state, or pretence of authority from any person whatever.

Article 107.

ADHERING ON THE SEA TO THE QUEEN'S ENEMIES.

[4] Every one is deemed to be a pirate who, being a natural-born subject or denizen of her Majesty, during any war commits any hostility against her Majesty's subjects upon the sea, or in any haven, river, creek, or place where the admiral has power or jurisdiction, by virtue or under colour of any commission from any of her Majesty's enemies, or is any way adherent or gives aid or comfort to her Majesty's enemies upon the sea or in any other such place as aforesaid.

[1] 1 Vict. c. 88, s. 2.

[2] The Act 31 Vict. c. 24, as to executions taking place within the walls of a prison, does not apply to this offence; see ss. 2 & 16.

[3] 11 & 12 Will. 3, c. 7, s. 7.

[4] 18 Geo. 2, c. 30.

Article 108.

BOARDING SHIPS AND THROWING CARGO OVERBOARD.

[1] Every one is deemed to be a pirate who, belonging to any ship or vessel whatever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek, forcibly boards and enters into such ship or vessel, and though he does not seize or carry off such ship or vessel, throws overboard or destroys any part of the goods or merchandises belonging to such ship or vessel.

Article 109.

MASTERS AND SEAMEN FAVOURING PIRATES.

[2] Every one is deemed to be a pirate who, being the commander or master of any ship, or a seaman or mariner in any place where the admiral has jurisdiction, betrays his trust, and turns pirate, enemy, or rebel, and piratically and feloniously runs away with his ship, or any barge, boat, ordnance, ammunition, goods, or merchandise; or

Yields them up voluntarily to any pirate; or

Brings any seducing message from any pirate, enemy, or rebel; or

Consults, combines, or confederates with or attempts to corrupt any commander, master, officer, or mariner to yield up or run away with any ship, goods, or merchandise, or turn pirate or go over to pirates; or

Lays violent hands on his commander whereby to hinder him from fighting in defence of his ship and goods committed to his trust; or

Confines his master, or makes or endeavours to make a revolt in the ship [[3] even if the object of such revolt is to redress real grievances].

[1] 8 Geo. 1, c. 24, s. 1 (last part).

[2] 11 & 12 Will. 3, c. 7, s. 8. Section 9 enacts in substance that accessaries to piracy shall be punished as pirates.

[3] The words bracketed give the effect of *R.* v. *Hastings*, 1 Moody, 82; *R.* v. *M'Gregor*, 1 C. & K. 429. As to "confines," see *R.* v. *Jones*, 11 Cox, C. C. 393.

Article 110.

TRADING WITH PIRATES AND CONSPIRING WITH THEM.

[1] Every one is deemed to be a pirate who in any wise trades with any pirate by truck, barter, exchange, or in any other manner, or furnishes any pirate, felon, or robber upon the seas with any ammunition, provision, or stores of any kind; or

Fits out any ship or vessel knowingly and with a design to trade with, or supply, or correspond with any pirate, felon, or robber on the seas; or

In any way consults, combines, confederates, or corresponds with any pirate, felon, or robber on the seas knowing him to be guilty of any such piracy, felony, or robbery.

Article 111.

PUNISHMENT FOR STATUTORY PIRACIES.

[2] Every one who commits any of the offences defined in Articles 106–110, both inclusive, is liable upon conviction of such act to penal servitude for life as a maximum punishment, the maximum period of imprisonment being three years.

Article 112.

NOT FIGHTING PIRATES.

[3] Every one commits a misdemeanor, and must, on conviction thereof, be imprisoned for six months, who being a commander, master, or any officer or seaman, or mariner of any merchant ship which carries guns and arms, does not, when attacked by any pirate, or by any ship on which any pirate is on board, fight and endeavour to defend himself and his vessel from being taken by such pirate, or who utters any words to discourage the other mariners from defending the ship, so that the ship falls into the hands of such pirate.

[1] 8 Geo. 1, c. 24, s. 1 (first part).
[2] 1 Vict. c. 88, s. 3, S.
[3] 8 Geo. 1, c. 24, s. 6.

ARTICLE 113.

SLAVE TRADING DEFINED.

[1] Each of the following acts and every contract to do any one of them is an act of slave-trading:—

(*a.*) To deal or trade in, purchase, sell, barter, or transfer slaves or persons intended to be dealt with as slaves.

(*b.*) To carry away or remove slaves or other persons as or in order to their being dealt with as slaves.

(*c.*) To import or bring into any place whatsoever slaves or other persons as or in order to their being dealt with as slaves.

(*d.*) To ship, tranship, embark, receive, detain, or confine on board any [2] vessel slaves or other persons—

For the purpose of their being carried away or removed as or in order to their being dealt with as slaves; or

For the purpose of their being imported into any place whatever as or in order to their being dealt with as slaves.

(*e.*) To fit out, man, navigate, equip, dispatch, use, employ, let, or take to freight, or on hire, any [2] vessel, in order to do any act of slave-trading before mentioned.

(*f.*) To lend or advance, or become security for the loan or advance of money, goods or effects, employed or to be employed in any act of slave-trading before mentioned.

(*g.*) To become guarantee or security for agents employed, or to be employed in any act of slave-trading before mentioned.

(*h.*) To engage in any other manner in any act of slave-trading before mentioned, directly or indirectly, as a partner, agent, or otherwise.

(*i.*) To ship, tranship, lade, receive, or put on board of any [2] vessel money, goods, or effects, to be employed in any act of slave-trading before mentioned.

(*j.*) To take the charge or command, or to navigate, or

[1] 5 Geo. 4, c. 113, s. 2. The language of this Act is very elaborate, and I have not noticed every deviation from it. I believe that this and the next article give its effect quite correctly, though in a very different shape.

[2] "Ship, vessel, or boat."

enter and embark on board any [1] vessel in [2] any capacity, knowing that such [1] vessel is employed in any act of slave-trading before mentioned, or is intended to be so employed upon the voyage or upon the occasion in which the embarkation takes place.

(*k.*) To insure slaves or property employed or intended to be employed in slave-trading.

Article 114.

PIRATICAL SLAVE-TRADING.

[3] Every subject of her Majesty, and every person resident or being in any of her Majesty's dominions [4] commits piracy, felony, and robbery, and is liable, upon conviction thereof, to penal servitude for life as a maximum punishment, who upon the high seas, or in any place where the admiral has jurisdiction, knowingly and wilfully does or assists in doing any of the following things, that is to say:—

(*a.*) Who carries away, conveys, or removes any person As a slave; or

For the purpose of his being imported or bought as a slave into any [5] place whatsoever; or

For the purpose of his being used, transferred, sold, or dealt with as a slave; or

(*b.*) Who ships, embarks, receives, detains, or confines any person on board any vessel for the purpose of his being carried away, conveyed, or removed as a slave; or

For the purpose of his being imported or brought as a slave into any [5] place whatsoever; or

For the purpose of his being sold, transferred, used, or dealt with as a slave.

[1] "Ship, vessel, or boat."

[2] "As captain, master, mate, petty officer, surgeon, supercargo, seaman, marine, or servant, or in any other capacity."

[3] 5 Geo. 4, c. 113, s. 9 (redrawn). The punishment in the text is substituted for the punishment of death by 1 Vict. c. 81, s. 1, and the penal servitude Acts.

[4] "Dominions, ports, settlements, factories, or territories now or hereafter belonging to Her Majesty, or being in Her Majesty's occupation or possession."

[5] "Island, colony, country, territory, or place."

Article 115.

PUNISHMENT OF SLAVE TRADING.

[1] Everyone [[2] owing allegiance to her Majesty] commits felony, and is liable upon conviction thereof to be kept in penal servitude for a maximum term of fourteen years, or to be imprisoned with hard labour for a maximum term of five years who [[2] in any part of the world] does any of the acts of slave-trading specified in Article 113, clauses (*a*), (*b*), (*c*), (*d*), (*e*); or

Knowingly and wilfully does any of the acts of slave-trading specified in Article 113, clauses (*f*), (*g*), (*h*), (*i*), or (*k*).

Article 116.

SERVING ON A SLAVE-SHIP, FELONY.

[3] Every one commits the same offence, and is liable to the same punishment as is specified in the last article, who takes charge or command, or navigates, or embarks on board any vessel as captain, master, mate, surgeon, or supercargo, or contracts to do so, knowing that such vessel is actually employed, or is on that voyage or occasion intended to be employed in any act of slave-trading.

Article 117.

SERVING ON A SLAVE-SHIP, MISDEMEANOR.

[4] Every one commits a misdemeanor, and is liable upon conviction, to a maximum punishment of two years' imprisonment, who with the knowledge mentioned in the last article, does any of the things mentioned in that article, as petty officer, seaman, marine, or servant, or in any other capacity not specifically mentioned therein.

[1] 5 Geo. 4, c. 113, s. 10 (redrawn).

[2] These words are inserted to give the effect of *R.* v. *Zulueta*, 1 C. & K. 215, 226–7. See, however, *Santos* v. *Illidge*, 8 C. B. (N.S.) 861, in which the Court of Exchequer Chamber was equally divided upon a very similar, though not identical, point.

[3] 5 Geo. 4, c. 113, s. 10.

[4] Ibid. s. 11.

PART III.

ABUSES AND OBSTRUCTIONS OF PUBLIC AUTHORITY.

CHAP. XI.—ABUSES OF AUTHORITY—OPPRESSION—EXTORTION—FRAUD—NEGLECT OF DUTY—REFUSAL TO ACT.

CHAP. XII.—DISOBEDIENCE TO LAWFUL ORDERS.

CHAP. XIII.—BRIBERY AND CORRUPTION—SALE OF OFFICES.

CHAP. XIV.—MISLEADING JUSTICE—PERJURY — FALSE SWEARING — SUBORNATION.

CHAP. XV. — ESCAPE — RESCUE — PRISON BREACH—MISPRISIONS—COMPOUNDING OFFENCES.

CHAPTER XI.

ABUSES OF AUTHORITY, OPPRESSION, EXTORTION, FRAUD, NEGLECT OF DUTY, REFUSAL TO ACT.

ARTICLE 118.

"PUBLIC OFFICER" DEFINED.

[1] THE expression "public officer," in this chapter, means a person invested with authority to execute any public duty, and legally bound to do so, but does not include any member of either House of Parliament as such, or any ecclesiastical, naval, or military officer acting in the discharge of duties for the due discharge of which he can be made accountable only by an ecclesiastical, naval, or military court.

ARTICLE 119.

EXTORTION AND OPPRESSION BY PUBLIC OFFICERS

[2] Every public officer commits a misdemeanor who, in the

[1] See 7 Rep. Crim. Law Crs. ch. iv., p. 153, and cf. 5 Rep. Crim. Law Crs. p. 40. It would be foreign to the purpose of this work to discuss the question of the limits of the jurisdiction of the Courts of Common Law, and Ecclesiastical and Military Courts.

[2] *R.* v. *Wyat*, 1 Salk. 380; *R.* v. *Bembridge*, 3 Doug. 327, and 22 St. Tr. 1-159; Bacon, Abridgment, tit. "Office and Officer," N.; *R.* v. *Bowron*, 3 B. & Ad. 434; and see cases referred to in the Illustrations.

exercise, or under colour of exercising the duties of his office, does any illegal act, or abuses any discretionary power with which he is invested by law from an improper motive, the existence of which motive may be inferred either from the nature of the act, or from the circumstances of the case. But an illegal exercise of authority caused by a mistake as to the law, made in good faith, is not a misdemeanor within this article.

[1] If the illegal act consists in taking under colour of office from any person any money or valuable thing which is not due from him at the time when it is taken, the offence is called "extortion."

If it consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not being extortion, the offence is called "oppression."

Illustrations.

(1.) [1] The Lord Chief Justice of England passes upon B and C sentences for similar offences so disproportionate, as to shew partiality. He commits oppression.

(2.) [2] The Governor-General of India wrongfully compels a native prince to pay sums of money to the Indian government. He commits extortion.

(3.) [3] A and B, justices of the peace, refuse licenses to the keepers of public houses, because they refuse to vote as the justices wish. A and B commit oppression.

(4.) [4] A, a justice of the peace, sends his servant to the house of correction for being saucy and giving too much corn to his horses. A commits oppression.

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[1] 4th Article of Impeachment against Scroggs, C. J., 8 St. Tr. 199.

[2] This was the gist of the Cheyte Singh charge in the impeachment of Warren Hastings. It is remarkable that neither in Debrett's History of the Trial, nor in Mr. Mill's History of India, nor in Lord Macaulay's elaborate Essay on Warren Hastings, nor in Marshman's History of India, are the charges against Hastings distinctly stated. It seems to a lawyer natural to give at least an abstract of the indictment in order to render an account of a trial intelligible, but historians are apt to take a different view. Lord Macaulay in particular is so much interested in Burke's rhetoric that he omits to say what it was all about. In Mr. Massey's History of George III., vol. iii. p. 337, Burke's summary of the ten charges which he opened is given, but Mr. Massey observes that only one of the ten was "distinct and substantive." The transactions with Cheyte Singh are described in Mill's British India, iv. 321, &c., in Lord Macaulay's Essays, p. 620 (ed. of 1850), and in Marshman's History, i. 424.

[3] *R.* v. *Williams*, 2 Burr. 1317.

[4] *R.* v. *Okey*, 8 Mod. 46. (According to *R.* v. *Morfit*, Ru. & R. 307, decided long afterwards, A might have committed his servant for theft.)

(5.) [1] A, a justice, acting as such, orders B to be whipped, without such proof or information as the law requires. A commits oppression.

(6.) [2] A, a constable, having B in custody on a warrant for an assault, obtains money from B upon colour and pretence that A will procure the warrant to be discharged. A commits extortion.

(7.) [3] A, a justice, commits B, a pauper, to prison for refusing to answer questions which A had a right to put as to B's settlement, believing in good faith that A had a legal right to commit B. A does not commit a misdemeanor.

(8.) [4] A, a justice, illegally refuses to accept bail for a person entitled to be bailed, under an opinion, hastily adopted in a crisis of real danger, that it was right to do so. A does not commit a misdemeanor.

Article 120.

ILLEGALLY IMPRISONING SUBJECTS BEYOND THE SEAS.

[5] Every one commits a misdemeanor who knowingly frames, contrives, writes, seals, or countersigns any warrant for the commitment, detainer, or transportation of any subject of this realm resident in England, Wales, or Berwick, as a prisoner in or to Scotland, Ireland, Jersey, Guernsey, or any other place beyond the sea, with or without the Queen's dominions, or who so commits, detains, imprisons, or transports any person.

Whoever commits any such misdemeanor is put out of the Queen's protection. His lands, tenements, goods, and chattels are forfeited to the Queen, and he is to be imprisoned for life (or perhaps at the Queen's pleasure).

Article 121.

FRAUDS AND BREACHES OF TRUST BY OFFICERS.

[6] Every public officer commits a misdemeanor who, in the discharge of the duties of his office commits any fraud or breach of trust affecting the public, whether such fraud or

[1] See precedent of indictment, 2 Chit. Crim. Law, 236.

[2] Precedent of indictment, 2 Chit. Crim. Law, 292.

[3] *R.* v. *Jackson*, 1 T. R. 653.

[4] *R.* v. *Badger*, 4 Q. B. 475.

[5] 31 Car. 2, c. 2, s. 11, the Habeas Corpus Act. The penalty is præmunire, as explained by Coke, 1 Inst. 130 a. 7th Rep. C. C. L. p. 37.

[6] See cases in Illustrations.

breach of trust would have been criminal or not if committed against a private person.

Illustrations.

(1.) [1] A, an accountant in the office of the Paymaster-General, fraudulently omits to make certain entries in his accounts, whereby he enables the cashier to retain large sums of money in his own possession, and to appropriate the interest on such sums to himself after the time when they ought to have been paid to the Crown. A commits a misdemeanor.

(2.) [2] A, a commissary-general of stores in the West Indies, makes contracts with B to supply stores, on the condition that B should divide the profits with A. A commits a misdemeanor.

Article 122.

NEGLECT OF OFFICIAL DUTY.

[3] Every public officer commits a misdemeanor who wilfully neglects to perform any duty which he is bound either by common law or by statute to perform, provided that the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.

Illustrations.

(1.) [4] A, the mayor of B, neglects to perform various acts which it was in his power to do, and which a man of ordinary prudence, firmness, and activity, might have been expected to do, in order to suppress riots in B. A is guilty of a misdemeanor.

(2.) [5] A, the Lord Mayor of London, refrains from making the proclamation in the Riot Act, and from ordering soldiers to disperse a mob, because he is afraid to do so, in circumstances in which a man of ordinary courage would not have been afraid. A commits a misdemeanor.

(3.) [6] A, a sheriff, refuses to execute a criminal condemned to death. A commits a misdemeanor.

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[1] *R.* v. *Bembridge*, 3 Doug. 332; 22 St. Tr. 1–159. This would now be an offence in the case of a private person under 38 & 39 Vict. c. 24, s. 2. See *post*, Art. 352.

[2] *R.* v. *Valentine Jones*, 31 St. Tr. 251.

[3] *R.* v. *Wyatt*, 1 Salk. 381; *R.* v. *Bembridge*, 3 Doug. 332; 22 St. Tr. 1–159; Comyn's Digest, tit. Indictment, D.; *R.* v. *Jones*, Strange, 1146; 4 Steph. Com. 326.

[4] *R.* v. *Pinney*, 5 C. & P. 254, and 3 B. & Ad. 946. This is the case of the Bristol riots. Mr. Pinney was, in fact, acquitted; but the case involves the principle of the illustration.

[5] *R.* v. *Kennett* (Lord Mayor in 1780), printed in 5 C. & P. 282, as a note to *R.* v. *Pinney*.

[6] *R.* v. *Antrobus*, 2 A. & E. 798.

(4.) [1] A, a coroner, refuses to take an inquest on a body, after notice that it is lying dead in his jurisdiction. A commits a misdemeanor.

(5.) [2] A, a constable, wilfully refuses to arrest a person who commits a felony in his presence. A commits a misdemeanor.

(6.) [3] A, a clergyman of the Church of England refuses to solemnise marriage between persons who might lawfully be married and who tender themselves for that purpose. He commits a misdemeanor.

Article 123.

REFUSAL TO SERVE AN OFFICE.

[4] Every one commits a misdemeanor who unlawfully refuses or omits to take upon himself and serve any public office which he is by law required to accept if duly appointed; but this article does not extend to cases in which any other penalty is imposed by law for such refusal or neglect, or to any case in which by law or by custom any person is permitted to make any composition in place of serving any office.

Illustration.

A person may be indicted for refusing to exercise the office of overseer of the poor or parish constable.

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[1] 2 Hale, P. C. 58; and see precedent of indictment, 2 Chit. Crim. Law, 255.

[2] 2 Hawk. P. C. p. 129; *cf.* p. 115.

[3] *R.* v. *James*, 2 Den. 1. The conviction in this case was quashed on the narrow ground that the parties did not sufficiently tender themselves for marriage. The objection that the offence was only an ecclesiastical one was taken, but no judgment was delivered on it. A refusal to bury would probably stand on the same footing. By 1 Edw. 6, c. 1, it is enacted that a minister "shall not without lawful cause deny" (the Sacrament) "to any person that will devoutly and humbly desire it." An indictment for such a denial would be incongruous and indecent, but it is difficult to find any definite legal ground for saying that it would not lie. (See *Jenkins* v. *Cook*, L. R. 1 P. D. 80).

[4] *R.* v. *Bower*, 1 B. & C. 585; and see 5th Report, C. L. C. 41, where many authorities are cited. Also 1 Russ. Cr. 212–3.

CHAPTER XII.

DISOBEDIENCE TO LAWFUL ORDERS.

ARTICLE 124.

DISOBEDIENCE TO A STATUTE.

[1] EVERY one commits a misdemeanor who wilfully disobeys any statute of the realm by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears from the statute that it was the intention of the Legislature to provide some other penalty for such disobedience.

ARTICLE 125.

DISOBEDIENCE TO LAWFUL ORDERS OF COURT, &c.

[2] Every one commits a misdemeanor who disobeys any order, warrant, or command duly made, issued, or given by any court, officer, or person acting in any public capacity and duly authorized in that behalf, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience.

Illustrations.

(1.) [3] A refuses to assist a constable in the execution of his duty when lawfully called upon by the constable to do so. A commits a misdemeanor.

(2.) [4] A refuses to pay money for the support of his bastard child which he has been ordered to pay by the Quarter Sessions. A commits a misdemeanor.

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[1] *R.* v. *Wright*, 1 Burr, 543; *R.* v. *Harris*, 4 T. R. 205; 5th Report, C. L. C. 43; 2 Hawk. P. C. 289.

[2] 5th Report, C. L. C. 43; *Jones's Case*, 2 Moo. 171; *R.* v. *Dale*, Dear. 37.

[3] *R.* v. *Sherlock*, L. R. 1 C. C. R. 20.

[4] *R.* v. *Ferrall*, 2 Den. 51. In this case Pollock, C.B., asked how it would be if the man could not pay? and whether a refusal to pay a fine is indictable. The answer would seem to be that it is. Imprisonment on such an indictment would only be a roundabout way of doing what is commonly done in cases of fine, viz., inflicting an alternative term of imprisonment. Whether a man is sentenced to be fined £100 and to be imprisoned in default of payment, or to be imprisoned because he has not obeyed the order of the Court to pay a fine of £100, is rather a matter of form than anything else.

CHAPTER XIII.

BRIBERY AND CORRUPTION—SALE OF OFFICES.

ARTICLE 126.

JUDICIAL CORRUPTION.

[1] EVERY one who gives or offers to any person holding any judicial office, and every person holding any judicial office who accepts any bribe, commits a misdemeanor.

Every gift or payment made in respect of or in relation to any business having been, being, or about to be transacted before any such person in his office is a bribe, whether it is given in order to influence the judicial officer in something to be done, or to reward him for something already done, and whether the thing done or to be done is itself proper or improper.

ARTICLE 127.

CORRUPTION OF OTHER PUBLIC OFFICERS.

[2] Every one commits a misdemeanor who by any means endeavours to force, persuade, or induce any public officer not being a judicial officer to do or omit to do any act which the offender knows to be a violation of such officer's official duty.

ARTICLE 128.

EMBRACERY.

[3] Every one commits the misdemeanor called embracery who by any means whatever except the production of evidence and argument in open court attempts to influence or instruct

[1] 3 Inst. 144–8; 1 Hawk. P. C. 414–5; 5th Rep. C. L. C. p. 20–1. See, too, Spedding's Life of Bacon, vii. 209–78. The crime is so rare that the definition is very imperfect and more or less conjectural.

[2] 5th Report, C. L. C. art. 3. 35, p. 47. Many authorities are cited, and in particular the chapters of the 3rd Inst. and Hawkins referred to in the last note; also *R.* v. *Vaughan*, Burr. 2494, see especially 2501.

[3] 1 Hawk. P. C. 466; 1 Russ. Cr. 264.

any juryman, or to incline him to be more favourable to the one side than to the other in any judicial proceeding whether any verdict is given or not, and whether such verdict, if given, is true or false.

Article 129.

DEFINITION OF BRIBERY OF VOTERS.

[1] Every one is guilty of bribery

(*a.*) Who directly or indirectly by himself or by any other person on his behalf,

[2] in order to induce any voter to vote or refrain from voting at any election;

[3] or corruptly on account of such voter's having voted or refrained from voting at any election;

[4] or in order to induce any person to procure or endeavour to procure the return of any person at any election, or the vote of any voter at any election,

(i.) [5] Gives, lends, or agrees to give or lend, or offers or promises, or promises to procure or to endeavour to procure any money or valuable consideration to or for [6] any person whatever:

(ii.) [7] Gives or procures, or agrees to give or procure, or offers or promises, or promises to procure or to endeavour to procure any office, place, or employment to or for any person what ever; or

(*b.*) [8] Who in consequence of any such gift, loan, offer, promise, procurement, or engagement, procures or engages promises or endeavours to procure the return of any person in any election or the vote of any voter at any election; or

(*c.*) [9] Who advances or pays or causes to be paid any

[1] 17 & 18 Vict. c. 102, s. 2.
[2] Sect. 2 (1), (2).
[3] Sect. 2 (1), (2).
[4] 17 & 18 Vict. c. 102, s. 2 (3).
[5] Ibid. s. 2 (1), (2).
[6] "Any person" = any voter, or to or for any person on behalf of any voter, or to or for any other person.
[7] 17 & 18 Vict. c. 102, s. 2 (1), (2).
[8] Sect. 2 (4).
[9] Sect. 2 (5).

money to, or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election; or

(*d.*) [1] Who being a voter before or during any election directly or indirectly by himself or by any other person on his behalf receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place, or employment for himself or for any other person for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election: or

(*e.*) [2] Who after any election directly or indirectly by himself or by any other person on his behalf receives any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or to refrain from voting.

Nothing in clauses (*a*), (*b*), or (*c*) extends to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at, or concerning any election.

Article 130.

Definition of undue influence.

[3] Every one commits the offence of undue influence

(*a.*) Who directly or indirectly by himself or by any other person on his behalf makes use of or threatens to make use of any force, violence, or restraint, or inflicts or threatens the infliction by himself or by or through any other person of any injury, damage, harm, or loss, or in any other manner practices intimidation upon or against any person in order to induce or compel him to vote or refrain from voting, or on account of his having voted or refrained from voting at any election; or

(*b.*) Who by abduction, duress, or any fraudulent device

[1] 17 & 18 Vict. c. 102, s. 3 (1).
[2] Sect. 3 (2).
[3] Sect. 5.

or contrivance impedes, prevents, or otherwise interferes with the free exercise of the franchise of any voter, or thereby compels, induces, or prevails upon any voter either to give or to refrain from giving his vote at any election.

Article 131.

PUNISHMENT OF BRIBERY AT CERTAIN ELECTIONS.

[1] Every person is guilty of a misdemeanor who commits bribery or undue influence at or in respect of any election of any member to serve in Parliament, or any election to the office of mayor, alderman, councillor, auditor, assessor of a borough or ward of a borough subject to the provisions of the 5 & 6 Will. 4, c. 76.

Article 132.

DEFINITION OF OFFICE.

The word "office" in Articles 133 and 134 includes

[2] Every office in the gift of the Crown or of any officer appointed by the Crown, and all commissions, civil, naval, and military, and all places or employments in any public department or office whatever in any part of her Majesty's dominions whatever, and all deputations to any such office and every participation in the profits of any such office or deputation.

Article 133.

SELLING OFFICES.

[3] Every one commits a misdemeanor who does any of the following things in respect of any office, or any appointment to or resignation of any office, or any consent to any such appointment or resignation, that is to say, every one who directly or indirectly

(*a.*) Sells the same, or receives any reward or profit from the sale thereof, or agrees to do so:

[1] 17 & 18 Vict. c. 102, ss. 2, 3, 5; 35 & 36 Vict. c. 60, ss. 2, 3. Offenders are also liable to be sued for penalties by informers.

[2] 5 & 6 Edw. 6, c. 16; 49 Geo. 3, c. 126, s. 1.

[3] 49 Geo. 3, c. 126, s. 3, greatly condensed.

(*b.*) Purchases, or gives any reward or profit for the purchase thereof, or agrees or promises to do so.

[1] Whoever commits either of these misdemeanors upon its commission forfeits to the Queen any right which he may have in the office, and is disabled to hold it for life, and it is not lawful for the Queen to dispense him from such disability.

Article 134.

MAKING INTEREST FOR OFFICES FOR REWARD.

[2] Every one commits a misdemeanor who does any of the following things directly or indirectly:

(*a.*) Receives or agrees to receive any reward or profit for any interest, request, or negotiation about any office, or under pretence of using any such interest, making any such request, or being concerned in any such negotiation:

(*b.*) Gives or procures to be given any profit or reward, or makes or procures to be made any agreement for the giving of any profit or reward for any such request or negotiation as aforesaid:

(*c.*) Solicits, recommends, or negotiates in any manner as to any appointment to or resignation of any office in expectation of any reward or profit:

(*d.*) [3] Keeps any office or place for transacting or negotiating any business relating to vacancies in or the sale or purchase of or appointment to or resignation of offices.

[1] 5 & 6 Edw. 6, c. 16, s. 1; 49 Geo. 3, c. 126, s. 2; *Ingram's Case*, 3 Inst. 154. The 5 & 6 Edw. 6, c. 16, s. 1, is repealed as to offices in the Customs, by 6 Geo. 4, c. 105, No. 10. It was, however, extended to offices in the Customs as well as to many others, by 49 Geo. 3, c. 126. I do not quite understand the result of this. The present Customs Act, 39 & 40 Vict. c. 36, throws no light on the subject.

[2] 49 Geo. 3, c. 126, s. 4.

[3] Ibid. s. 5.

CHAPTER XIV.

MISLEADING JUSTICE—PERJURY—FALSE SWEARING—SUBORNATION.

ARTICLE 135.

* PERJURY DEFINED.

[1] PERJURY is an assertion upon an oath duly administered in a judicial proceeding, before a competent Court, of the truth of some matter of fact, material to the question depending in that proceeding, which assertion the assertor does not believe to be true when he makes it, or on which he knows himself to be ignorant.

[2] In this definition, the word "oath" includes every affirmation which any class of persons are by law permitted to make in place of an oath.

[3] The expression "duly administered," means administered in a form binding on his conscience, to a witness legally called before them, by any Court, judge, justice, officer, commissioner, arbitrator, or other person, who by the law for the time being in force, or by consent of the parties, has authority to hear, receive, and examine evidence.

[4] The fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience.

[5] The expression "judicial proceeding," means a proceeding

* See Note VII.

[1] 3rd Inst. 167; 1 Hawk. P. C. 429–435; 3 Russ. Cr. 1, &c., and see note, 5th Report, C. L. C. 23.

[2] Many statutes to this effect have been passed. See in particular 32 & 33 Vict. c. 68, s. 4; 33 & 34 Vict. c. 49; and see statutes as to particular religious bodies collected in 3 Russ. Cr. 26–9.

[3] 14 & 15 Vict. c. 99, s. 16, passed to remove doubts in the question by whom an oath might be administered, 3 Russ. Cr. 3. As to using a form binding on the witness's conscience see 1 & 2 Vict. c. 105; *Omichund* v. *Barker*, 1 Sm. L. C. 455.

[4] *Ides* v. *Hoare*, 2 B. & B. 232.

[5] Illustrations (2), (3), (4).

which takes place in or under the authority of any Court of justice, or which relates in any way to the administration of justice, or which legally ascertains any right or liability.

[1] The word "fact," includes the fact that the witness holds any opinion or belief.

[2] The word "material," means of such a nature as to affect in any way, directly or indirectly, the probability of anything to be determined by the proceeding, or the credit of any witness, and a fact may be material although evidence of its existence was improperly admitted.

Illustrations.

(1.) A swears that certain goods are of a certain value.

[3] A is entirely ignorant upon the subject. A is guilty of perjury whether the goods are of that value or not.

The goods are not of that value, and A knows it. A has committed perjury.

[4] The goods are of that value but A believes that they are not. A has committed perjury.

The goods are not of that value, but A believes that they are. A has not committed perjury.

(2.) [5] A proceeding before a local marine board sitting under the Merchant Shipping Act, 1854, and having power to suspend or cancel the certificates of the masters and mates of ships, is a judicial proceeding.

(3.) [6] An inquiry before a sheriff as to the amount of damages is a judicial proceeding.

(4.) [7] An inquiry before a justice of the peace as to making a man find sureties for the peace is a judicial proceeding.

(5.) [8] A swears that he thinks that certain words are in his handwriting. The jury find that he did not think so. A commits perjury.

(6.) [9] A, a witness under cross-examination, denies an imputation which goes to his credit only. B is improperly permitted to contradict A. B swears falsely. B commits perjury on a material fact.

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[1] Illustration (5).

[2] Illustrations (6), (7).

[3] *R.* v. *Mawbey*, 6 T. R. 637.

[4] *Gurney's Case*, 3 Inst. 166.

[5] *R.* v. *Tomlinson*, L. R. 2 C. C. R. 49.

[6] 1 Hawk. P. C. 430.

[7] Ibid.

[8] *R.* v. *Schlesinger*, 10 Q. B. 670.

[9] *R.* v. *Gibbon*, L. & C. 109. In the later case of *R.* v. *Tyson*, L. R. 1 C. C. R. 107, *R.* v. *Gibbon* was followed, but the facts are not so strong. See, too, *R.* v. *Mullany*, L. & C. 593.

(7.) [1] A falsely swears that he has examined a paper, alleged to be a copy, with an original will, in order to make the copy admissible. The paper is not put in evidence, and it would not have been admissible if it had been tendered. A commits perjury on a material fact.

ARTICLE 136.

SUBORNATION OF PERJURY.

[2] Subornation of perjury is procuring a person to commit a perjury, which he actually commits in consequence of such procurement.

ARTICLE 137.

PUNISHMENT OF PERJURY AND SUBORNATION.

[3] Perjury and subornation of perjury are misdemeanors, and every one who commits either is liable, upon conviction, to any term of penal servitude, or imprisonment with or without hard labour, not exceeding seven years.

ARTICLE 138.

FALSE SWEARING.

[4] Every one commits a misdemeanor, who swears falsely before any person authorized to administer an oath upon a matter of public concern, under such circumstances that the false swearing if committed in a judicial proceeding would have amounted to perjury.

Illustrations.

(1.) [5] A takes a false oath before a surrogate in order to obtain a marriage license. A commits a misdemeanor.

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[1] *Philpott's Case*, 2 Den. C. C. 309.

[2] If the perjury is not committed, the crime is incitement; see Article 47. See also 1 Hawk. P. C. 435, c. 87, s. 10.

[3] The punishment at common law was whipping, imprisonment, fine, and pillory. By 2 Geo. 2, c. 25, s. 2, seven years transportation or imprisonment with hard labour was added. By 3 Geo. 4, c. 114, hard labour was again authorized, I know not why. By 7 Wm. 4 & 1 Vict. c. 23, the pillory was abolished. Whipping is obsolete. Fines fall under Article 22. Thus the text represents the result.

[4] See cases in Illustrations.

[5] *Chapman's Case*, 1 Den. C. C. 432.

(2.) [1] A takes a false oath before commissioners appointed by the king to inquire into cases in which a royal grant was required to confirm title to lands. A commits a misdemeanor.

(3.) [2] A swears a false affidavit under the Bills of Sale Act (17 & 18 Vict. c. 36). A commits a misdemeanor.

Article 139.

Forging instruments of evidence and tendering them in proof.

Every one commits felony and is liable, upon conviction thereof, to a maximum punishment of seven years penal servitude, or to a maximum of three, and a minimum of one year's hard labour, who does any of the following things (that is to say),

(*a.*) [3] Forges the seal, stamp, or signature of any such certificate, official, or public document, or document or proceeding of any corporation or joint stock or other company as is mentioned or referred to in the preamble to 8 & 9 Vict. c. 113, or of any document referred to in 14 & 15 Vict. c. 99, or any certified copy of any document, bye-law, entry in any register, or other book or other proceeding in the first-mentioned Act referred to.

(*b.*) Tenders in evidence any such document knowing the same to be false and counterfeit.

(*c.*) Forges the signature of any judge of the Supreme Court attached or appended to any decree, order, certificate, or other judicial or official document.

(*d.*) Prints any copy of any private Act or of the journals of either House of Parliament, falsely purporting to have been printed by the printers to the Crown, or to either House of Parliament.

(*e.*) Tenders in evidence any such copy, knowing it not to have been printed by the person by whom it purports to have been printed.

[1] Hobart, 62. This case is given by Hawkins, 1 P. C. 430, as an instance of perjury in a proceeding not judicial; but this, I think, is a misconception.

[2] *R.* v. *Hodjkiss*, L. R. 1 C. C. R. 212.

[3] 8 & 9 Vict. c. 113, s. 4, and see my Digest of the Law of Evidence, Art. 79.

Article 140.

OFFICERS GIVING FALSE CERTIFICATES.

[1] Every one commits a misdemeanor, and is liable, upon conviction thereof, to a maximum punishment of twelve months imprisonment, who

Being an officer, required or authorized, by 14 & 15 Vict. c. 100, to furnish any certified copy under that Act, wilfully certifies any document as being a true copy or extract, knowing that the same is not a true copy or extract.

Article 141.

MAINTENANCE.

[2] Maintenance is the act of assisting the plaintiff in any legal proceeding in which the person giving the assistance has no valuable interest, or in which he acts from any improper motive.

Champerty is maintenance in which the motive of the maintainor is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject matter of the suit shall be divided between the plaintiff and the maintainor.

Buying or selling a pretended title is buying or selling lands, of which the title is known to be in dispute, below the value which they would have if the title was not in dispute, and to the intent that the buyer may carry on the suit in place of the seller.

A common barrator is one who habitually moves, excites, or maintains suits or quarrels, either at law or otherwise.

Whoever commits maintenance, or champerty, or buys

[1] 14 & 15 Vict. c. 100, s. 15.

[2] 1 Russ. Cr. (5th Ed.) 357–60. As to barratry, 362–3. See also 1 Hawk. P. C. 454–466, and Note VIII. in Appendix. The old Statute of Conspirators, 33 Edw. 1, and many other ancient statutes (3 Edw. 1, c. 18; 13 Edw. 1, c. 49; 1 Edw. 3, st. 2, c. 14; 20 Edw. 3, c. 4; 1 Ric. 2, c. 4; 7 Ric. 2, c. 15; 32 Hen. 8, c. 9; 4 Edw. 3, c. 11) refer to these offences, but do not throw much light on their nature.

or sells a pretended title, or is a common barrator, is guilty of a misdemeanor.

[1] Every person who practises as a solicitor or agent in any suit or action, after having been convicted of forgery, perjury, or common barratry, is liable to seven years penal servitude as a maximum punishment, upon an order to be made by the judge or judges of the Court in which the suit or action was brought, who must upon complaint or information examine the matter in a summary way in open court.

[2] Every one who sues any person in the name of a fictitious plaintiff, or in the name of a real person, but without his authority, commits a misdemeanor, and must, upon conviction thereof, be imprisoned for six months.

Article 142.

CONSPIRACY TO DEFEAT JUSTICE—DISSUADING WITNESSES FROM TESTIFYING.

Every one commits a misdemeanor who

(*a*) [3] Conspires with any other person to accuse any person falsely of any crime, or to do anything to obstruct, prevent, pervert, or defeat the course of justice; or

(*b*) [4] In order to obstruct the due course of justice, dissuades, hinders, or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so.

[1] 12 Geo. 1, c. 29, s. 4.

[2] 18 Eliz. c. 5, s. 4 (redrawn and modernised).

[3] Every person convicted of an offence against clause (*a*) is liable to be sentenced to hard labour. Wright on Conspiracies, 30; 14 & 15 Vict. c. 100, s. 29.

[4] 1 Hawk. P. C. 64; *R.* v. *Lady Lawley*, Strange, 904; and see 5th Rep. C. L. C. Art. 57.

CHAPTER XV.

ESCAPE—RESCUE—PRISON-BREACH—MISPRISIONS—COMPOUNDING OFFENCES.

ARTICLE 143.

VOLUNTARY PERMISSION BY OFFICERS OF ESCAPES BY PRISONERS.

[1] EVERY one who knowingly, and with an intent to save him from trial or execution, permits any person in his lawful custody to regain his liberty, otherwise than in due course of law, commits the offence of voluntary escape; and

Is guilty of high treason if the escaped prisoner was in his custody for and was guilty of high treason;

Becomes an accessory after the fact to the felony of which the escaped prisoner was guilty, if he was in his custody for and was guilty of felony; and

Is guilty of a misdemeanor if the escaped prisoner was in his custody for and was guilty of a misdemeanor.

ARTICLE 144.

NEGLIGENT PERMISSION BY OFFICERS OF ESCAPES BY PRISONERS.

[2] Every one is guilty of the misdemeanor called negligent escape who, by the neglect of any duty, or by ignorance of the law, permits a person in his lawful custody to regain his liberty otherwise than in due course of law.

The person escaping is deemed to have regained his liberty as soon as he gets out of sight of the person from whom he escapes, and not before.

ARTICLE 145.

RESCUE DEFINED.

[3] Rescue is the act of forcibly freeing a person from custody

[1] 2 Hawk. P. C. 192, 196, 197; 1 Russ. Cr. 583. It does not appear what is the effect of voluntarily permitting the escape of a man lawfully charged, but innocent in fact.

[2] 1 Hale, P. C. 602; 2 Hawk. P. C. 194 (speaks doubtfully as to the second paragraph).

[3] 1 Russ. Cr. 597; 2 Hawk. P. C. 201.

against the will of those who have him in custody. If the person rescued is in the custody of a private person, the offender must have notice of the fact that the person rescued is in such custody.

Article 146.

QUALITY OF OFFENCE OF RESCUE.

[1] Every one commits high treason, felony, or misdemeanor who rescues a prisoner imprisoned on a charge of, or under sentence for, high treason, felony, or misdemeanor respectively. [2] Any offender convicted of such a misdemeanor is liable to be sentenced to hard labour.

Article 147.

FELONIOUS RESCUES.

[3] Whoever feloniously rescues any prisoner is liable to a maximum punishment of seven years penal servitude, or to imprisonment with hard labour for a maximum period of three years.

Article 148.

RESCUING MURDERERS.

[4] Every one commits felony and is liable, upon conviction thereof, to penal servitude for life, as a maximum punishment, who by force sets at liberty, rescues, or attempts to rescue, or set at liberty any person out of prison, committed for or found guilty of murder, or rescues or attempts to rescue any person convicted of murder, going to execution or during execution.

Article 149.

ASSISTING ESCAPE OF PRISONERS OF WAR.

[5] Every one commits felony and is liable, upon conviction

[1] 1 Hale, P. C. 606; 1 Russ. Cr. 597.

[2] 14 & 15 Vict. c. 100, s. 29.

[3] 1 & 2 Geo. 4, c. 88, s. 1. The offence was formerly a clergyable felony, so that this enactment increased the punishment.

[4] 25 Geo. 2, c. 37, s. 9. As to punishment, 7 Wm. 4 & 1 Vict. c. 91.

[5] 52 Geo. 3, c. 156.

thereof to penal servitude for life, or for fourteen years, or for seven years, or to be imprisoned with or without hard labour for a maximum period of two years, who

(*a.*) [1] Assists any alien enemy of Her Majesty, being a prisoner of war in Her Majesty's dominions, whether such prisoner is confined as a prisoner of war in any prison or other place of confinement, or is suffered to be at large on his parole in Her Majesty's dominions or in any part thereof, to escape from such prison or place of confinement, or from Her Majesty's dominions, if at large on his [2] parole; or

(*b.*) [3] Who (owing allegiance to Her Majesty) after any such prisoner as aforesaid has quitted the coast of any part of Her Majesty's dominions in such his escape, knowingly and wilfully upon the high seas aids or assists such prisoner in his escape towards any other dominions or place.

Article 150.

RESCUING REVENUE PRISONERS.

[4] Every one commits a misdemeanor and is liable upon conviction thereof to a fine of one hundred pounds who rescues any person apprehended for any offence punishable by fine or imprisonment under the Customs Acts, or prevents, or attempts to prevent, his apprehension, or aids, abets, or assists in committing any such offence.

Article 151.

HELPING TO ESCAPE FROM PRISON.

[5] Every one commits felony and is liable upon conviction to be sentenced to imprisonment with hard labour for a term not exceeding two years, who aids any prisoner in escaping

[1] 52 Geo. 3, c. 156, s. 1.

[2] Sect. 2.

[3] Sect. 3.

[4] 39 & 40 Vict. c. 36, s. 187. This section also contains provisions as to several revenue offences which I omit as too special for this work, and for assaults on customs officers, as to which see Article 236 (*b*) and (*c*).

[5] 28 & 29 Vict. c. 126, s. 37. The word "thing" at the end of the section is not confined to things *ejusdem generis*. It includes a crowbar: *R* v. *Payne*, L. R. 1 C. C. R. 27.

or attempting to escape from any [1] prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison, any mask, dress, or other disguise, or any letter, or any other article or thing.

Article 152.

ESCAPE BY PERSONS IN CUSTODY.

[2] Every one commits a misdemeanor, [3] and is liable upon conviction thereof to be sentenced to hard labour, who, being lawfully in custody for any criminal offence escapes from that custody.

Article 153.

BREAKING PRISON.

[4] Every one commits felony who, being lawfully detained on a charge of, or under sentence for, treason or felony, breaks out of the place in which he is so detained, against the will of the person by whom he is detained.

If the offender is detained under a charge of misdemeanor the offence of breaking out of the place of confinement is a misdemeanor, [3] and is liable on conviction to be sentenced to hard labour.

The expression "breaks out" means an actual breaking of the place in which the party is confined, whether intentional or not.

Illustrations.

(1.) [5] A, lawfully confined in prison under a charge of felony, climbs over the prison wall and escapes. A has not committed an offence within this article (though he has within Article 152).

(2.) [5] On the top of the prison wall loose bricks are arranged so as to fall if disturbed. In climbing over the wall A accidentally disturbs and

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[1] "Prison," includes gaol, house of correction, bridewell, or penitentiary. It also includes the airing-grounds or other grounds or buildings occupied by prison officers for the use of the prison, or contiguous thereto (sect. 4).

[2] 2 Hawk. P. C. 182.

[3] 14 & 15 Vict. c. 100, s. 29.

[4] 2 Hawk. P. C. 183–189; 1 Russ. Cr. 592-5. There is a good deal of learning on the subject founded on 1 Edw. 2, st. 2, "De frangentibus prisonam," but it is mostly practically obsolete. This statute is not mentioned in the Revised Statutes.

[5] *R.* v. *Haswell*, R. & R. 458.

throws down one of them. A has committed an offence within this article.

Article 154.

ESCAPING FROM CERTAIN PRISONS.

[1] Every convict confined in Pentonville or Millbank prison, and every offender ordered to be confined in Parkhurst prison is liable to the consequences hereinafter mentioned who

At any time during the term of his imprisonment breaks prison; or

Who, while being conveyed to such prison, escapes from any person having the lawful custody of him; or

Who (being ordered to be confined in Parkhurst prison) escapes from the place of his confinement, or from any lands belonging to the prison.

Every such offender may for his first offence be punished by an addition to the term of his imprisonment, not exceeding three years in the case of prisoners confined in Millbank or Pentonville prisons, and two years in the case of prisoners under sentence of imprisonment in Parkhurst prison. Offenders under sentence of penal servitude in Parkhurst prison are liable to be punished in the same manner as other persons under sentence of penal servitude escaping from their place of confinement.

If any offender punished by such addition as aforesaid to his term of imprisonment is afterwards convicted of a second escape or breach of prison he is guilty of felony.

Every person confined in any of the said prisons is liable to be punished by an addition not exceeding twelve months to the term of his imprisonment who attempts to break prison (or in the case of Parkhurst prison to escape from the place of his confinement), or forcibly breaks out of his cell, or makes any breach therein with intent to [2] escape therefrom.

[1] As to Parkhurst Prison, 1 & 2 Vict. c. 82, s. 12; Pentonville, 5 & 6 Vict. c. 29, s. 24; Millbank, 6 & 7 Vict. c. 26, s. 22.

[2] This word does not apply to Pentonville.

Article 155.

TRANSPORTS OR PERSONS SENTENCED TO PENAL SERVITUDE BEING AT LARGE.

[1] Every one commits felony and is liable, upon conviction thereof, to be kept in penal servitude for life, as a maximum punishment, and to be previously imprisoned with or without hard labour for any term not exceeding four years

(*a.*) Who having been sentenced or ordered to be transported, or kept in penal servitude, or having agreed to transport himself on certain conditions, either for life or for any number of years, is afterwards at large within any part of Her Majesty's dominions, without some lawful cause, before the expiration of the term for which he was ordered to be transported or kept in penal servitude, or agreed to transport himself.

(*b.*) [2] Who aids, abets, counsels, or procures the commission of the offence defined in clause (*a*)

Article 156.

MISPRISION OF TREASON.

[3] Every one who knows that any other person has committed high treason, and does not within a reasonable time give information thereof to a judge of assize, or a justice of the peace, is guilty of misprision of treason, and must upon conviction thereof be sentenced to imprisonment for life, and to forfeit to the Queen all his goods and the profits of his lands during his life.

Article 157.

MISPRISION OF FELONY.

[4] Every one who knows that any other person has committed felony and conceals or procures the concealment

[1] 5 Geo. 4, c. 84, s. 22. Punishment altered by 4 & 5 Will. 4, c. 67.

[2] 4 & 5 Will. 4, c. 67.

[3] 1 Hawkins, P. C. 60. As to punishment, ii. 630; 1 Hale, P. C. 371–4. See Note IX.

[4] 1 Hawkins, P. C. 73. See Note IX.

thereof, is guilty of misprision of felony, and upon conviction thereof the offender, if a sheriff, coroner, or their bailiff, "[1] shall have one year's imprisonment and after make a "grievous fine" at the discretion of the [2] Court, "and if they "have not whereof they shall have imprisonment of [3] three "years."

In other cases the offender is guilty of a misdemeanor.

ARTICLE 158.

AGREEMENT NOT TO PROSECUTE.

[4] Every one commits a misdemeanor who, in respect of any valuable consideration, enters into an agreement not to prosecute any person for felony, or to shew favour to any person in any such prosecution.

ARTICLE 159.

COMPOUNDING PENAL ACTIONS.

[5] Every one commits a misdemeanor, who, having brought, or under colour of bringing, an action against any person under any penal statute in order to obtain from him any penalty, compounds the said action without order or consent of the Court [[6] whether any offence has in fact been committed or not].

[1] 3 Edw. 1, c. 9.

[2] The words "at the king's pleasure," mean this; see 1 Hale, P. C. 375.

[3] Others read "four." See Revised Statutes.

[4] 2 Hale, P. C. 619. Precedents of indictments, 2 Chit. Crim. Law, 219.

[5] 18 Eliz. c. 5, ss. 4, 5 (very much compressed). The punishment was the pillory, but see now 56 Geo. 3, c. 138, s. 2. See also *R.* v. *Somerton*, 6 Ea. 126; *R.* v. *Gotley*, Russ. & Ry. 84.

[6] *R.* v. *Best*, 2 Mod. C. C. 124.

PART IV.

ACTS INJURIOUS TO THE PUBLIC IN GENERAL.

CHAP. XVI. — UNDEFINED MISDEMEANORS.

CHAP. XVII. — OFFENCES AGAINST RELIGION.

CHAP. XVIII. — OFFENCES AGAINST MORALITY.

CHAP. XIX. — COMMON NUISANCES — DISORDERLY HOUSES.

CHAP. XX. — VAGRANCY.

CHAPTER XVI.

UNDEFINED MISDEMEANORS.

ARTICLE 160.

ACTS INVOLVING PUBLIC MISCHIEF.

[1] Acts deemed to be injurious to the public have in some instances been held to be misdemeanors, because it appeared to the Court before which they were tried that there was an analogy between such acts and other acts which had been held to be misdemeanors, although such first-mentioned acts

[1] See the whole of chapter i. of Sir W. Erle's work on Trade Unions, pp. 1–54, particularly pp. 48–53; also his account of *R.* v. *Rowlands* and *R.* v. *Duffield*, Ibid. 81–7. Wright on the Laws of Conspiracy should be studied, and contrasted with this. See also my account of the law of conspiracy in Roscoe's Criminal Evidence (8th Ed.), pp. 409–414. As to offences relating to the administration of justice, see 5th Rep. C. L. C. *passim*, but particularly p. 29, &c., p. 50, &c., and *R.* v. *Opie*, 1 Saund. 301; *R.* v. *King*, 8 T. R. 585, and other cases there cited. As to public officers, *R.* v. *Bembridge*, 22 St. Tr. 1. After quoting the judgment of Willes, J. (the colleague of Lord Mansfield) in *Millar* v. *Taylor* (4 Burr. 2312), to the effect that "justice, moral fitness, and public convenience, when applied to a new subject, make common law without precedent," Pollock, C.B., said, "I entirely agree with the spirit of this passage so far as it regards the repressing what is a public evil and preventing what would become a public mischief; but I think there is a wide difference between protecting the community against a new source of danger and creating a new right. I think the Common Law is quite competent to pronounce anything to be illegal which is manifestly against the public good; but I think the Common Law cannot create new rights," &c. (*Jefferys* v. *Boosey*, 4 H. L. C. 936). As to cheats affecting the public, see 2 East, P. C. 818–822.

were not forbidden by any express law, and although no precedent exactly applied to them,

This has been done especially in the case of agreements between more persons than one to carry out purposes which the judges regarded as injurious to the public, in which case such acts have been held to amount to the offence of conspiracy,

or when they have been done by a public officer in relation to his official duty,

or when they tended in any way to pervert the administration of justice, or to disturb the public peace,

or when the proceeding has been by parliamentary impeachment.

CHAPTER XVII.

OFFENCES AGAINST RELIGION.

ARTICLE 161.

BLASPHEMY DEFINED—ALTERNATIVE DEFINITIONS.

[1] EVERY publication is said to be blasphemous which contains

Matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind, or to excite contempt and hatred against the church by law established, or to promote immorality.

Publications intended in good faith to propagate opinions on religious subjects, which the person who publishes them regards as true, are not blasphemous (within the meaning of this

(*a.*) A denial of the truth of Christianity in general, or of the existence of God, whether the terms of such publication are decent or otherwise.

(*b.*) Any contemptuous reviling or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established, whatever may be the occasion of the publication thereof, and whether the matter published is, or is not, intended

[1] There is authority for each of these views, as may be seen from a collection of all the cases on the subject in Folkard's Edition of Starkie on Libel, pp. 593–603. Most of the cases are old, and I do not think that, in fact, any one has been convicted of blasphemy in modern times for a mere decent expression of disbelief in Christianity. Mr. Starkie many years ago wrote, "A wilful intention to pervert, insult, and mislead others by means of contumelious abuse applied to sacred subjects, or by wilful misrepresentations and artful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt." This is the language of a man who means, but is reluctant to say plainly, "You may deny Christianity to be true, but you must do it in a decent way, and with regard to the feelings of others." Lord Coleridge allows me to say that the left hand side of the page correctly states the law laid down in the last trial which took place for blasphemy, *R.* v. *Pooley*, tried at the Bodmin Summer Assizes, in 1857, before Coleridge, J. Lord Coleridge was counsel in that case.

definition) merely because their publication is likely to wound the feelings of those who believe such opinions to be false, or because their general adoption might tend by lawful means to alterations in the constitution of the church by law established.

in good faith as an argument against any doctrine or opinion.

Every one who publishes any blasphemous document is guilty of the misdemeanor of publishing a blasphemous libel.

Every one who speaks blasphemous words is guilty of the misdemeanor of blasphemy.

Article 162.

HERESIES.

[1] Every person who is guilty of atheism, blasphemy, heresy, schism, or any other damnable doctrine or opinion ([2] not punishable at common law), may, upon conviction thereof before a competent ecclesiastical Court, be directed to recant the same and to do penance therefor, and to be excommunicated and imprisoned for such term, not exceeding six months, as the Court pronouncing the sentence of excommunication may direct.

Article 163.

DENYING TRUTH OF CHRISTIANITY, &c.

[3] Every one commits a misdemeanor and upon conviction thereof is liable to the punishments hereinafter mentioned, who having been educated in, or at any time having made profession of, the Christian religion within this realm, by

[1] 29 Car. 2, c. 29; 53 Geo. 3, c. 127, ss. 1, 2, 3; and see Phillimore, Eccl. Law, 1075–7. The excommunication and term of imprisonment is signified to the Queen in Chancery, whereupon a writ issues "de excommunicato capiendo."

[2] *Phillimore* v. *Machon*, 1 P. D. 481; Co. Litt. 96 b.

[3] 9 & 10 Will. 3, c. 35, as altered by 53 Geo. 3, c. 160.

writing, printing, teaching, or advised speaking, denies the Christian religion to be true, or the holy scriptures of the Old and New Testament to be of Divine authority.

For the first offence the offender must be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or employment, ecclesiastical, civil, or military, or any part in them, or any profit or advantage appertaining to them, and if at the time of his conviction the person convicted enjoys or possesses any office, place, or employment, such office, place, or employment becomes [1] void.

Upon a second conviction for all or any of the said crimes the offender is from thenceforth disabled to sue, prosecute, plead, or use any action or information in any Court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever within this realm, and must also suffer imprisonment for the space of three years from the time of such conviction.

Provided that any person convicted of any of the aforesaid crimes for the first time shall be discharged from all penalties and disabilities incurred by such conviction, upon his acknowledgment or renunciation of such offence or erroneous opinions in the same court where he was convicted within four months after his conviction

Article 164.

DEPRAVING THE LORD'S SUPPER.

[2] Every one commits a misdemeanor who depraves, despises, or contemns the sacrament of the supper and table of the

[1] "Shall be and is hereby declared void."

[2] 1 Edw. 6, c. 1. s. 1, applied to the present Book of Common Prayer by 14 Car. 2, c. 4, s. 20. I have retained these and the following provisions because, though they are practically obsolete, they relate to acts which might still be done. But I have not thought it worth while to encumber the book with the statutes of præmunire, which, with hardly an exception, are only historical monuments of bygone political and religious conflicts, imposing penalties on acts which it is barely conceivable that any one should do in the present state of

Lord, in contempt thereof by any contemptuous words, or by any words of depraving, despising, or reviling, or by advisedly in any other wise contemning, despising, or reviling the said sacrament.

Article 165.

DEPRAVING THE BOOK OF COMMON PRAYER.

[1] Every one commits a misdemeanor and is liable upon conviction thereof to the punishments hereinafter mentioned, who does any of the following things; that is to say,

(*a.*) Who in any interlude, play, song, rhymes, or other open words, declares or speaks anything in derogation, depraving, or despising of the Book of Common Prayer, or of anything therein contained, or any part thereof; or

(*b.*) Who by open fact, deed, or open threatenings, compels, causes, or otherwise procures or maintains any parson, vicar, or other minister, in any cathedral or parish church or chapel, or in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise or in any other manner or form than is mentioned in the said book;

(*c.*) Who by any of the said means unlawfully interrupts and lets any parson, vicar, or other minister in any cathedral or parish church or chapel, in singing or saying common or open prayer, or ministering the sacraments, or any of them, in the manner mentioned in the said book.

For the first offence the offender must be fined one hundred marks, and in default of payment within six weeks after his conviction, must be imprisoned for six months.

For the second offence the offender must be fined four hundred marks, and in default of payment as aforesaid must be imprisoned for twelve months.

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society. The subject is treated fully in the 7th Report of the Criminal Law Commissioners, pp. 37–45. The offences are appealing to Rome from any of the Queen's Courts, 24 Hen. 8, c. 12; asserting that Parliament has a legislative authority without the Crown (3 Car. 2, c. 1), and some others.

[1] 1 Eliz. c. 2, s. 3, applied to the present Book of Common Prayer by 14 Car. 2, c. 4, s. 20.

For the third offence the offender must forfeit to the Queen all his goods and chattels and be imprisoned for life.

Article 166.

CLERGYMEN REFUSING TO USE THE BOOK OF COMMON PRAYER.

[1] Every one commits a misdemeanor and is liable upon conviction thereof to the punishments hereinafter mentioned, who, being a parson, vicar, or other minister whatsoever, that ought or should sing or say common prayer according to the Book of Common Prayer,

(*a.*) Refuses to use the said common prayer, or to minister the sacrament, in such cathedral or parish church, or other place, as he should use or minister the same;

(*b.*) Uses, wilfully and obstinately standing in the same, any other rite, ceremony, order, or form of mass, openly or privily, or matins, evensong, administration of the sacrament, or other [2] open prayer than is mentioned and set forth in the said book;

(*c.*) Preaches, declares, or speaks anything in derogation or depraving of the said book, or anything therein contained, or of any part thereof.

For the first offence the offender must forfeit to the Queen one year's profit of such of his benefices as Her Majesty appoints, and be imprisoned for six months, whether he has any benefice or not.

For the second offence the offender must be deprived *ipso facto* of all his spiritual promotions, and be imprisoned for a year, and if he has no promotion he must be imprisoned for life.

For the third offence the offender must be imprisoned for life.

[1] 2 & 3 Edw. 6, c. 1; 14 Car. 2, c. 4, s. 20, and see 1 Eliz. c. 2, s. 2, which slightly varies the penalty on one point.

[2] By "open prayer is meant that prayer which is for others to come unto or hear, either in common churches, or private chapels, or oratories, commonly called the Service of the Church."

Article 167.

DISTURBING PUBLIC WORSHIP.

(*a.*) [1] Every one commits a misdemeanor and is liable, upon conviction thereof, to a fine of forty pounds, who wilfully and maliciously or contemptuously disquiets or disturbs any meeting, assembly, or congregation of persons [2] lawfully assembled for religious worship, or in any way disturbs, molests, or misuses any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled.

(*b.*) [3] Every one commits a misdemeanor and is liable upon conviction thereof, before two justices of the peace, to a fine not exceeding five pounds, or, if the justices think fit, to imprisonment for any time not exceeding two months,

who is guilty of riotous, violent, or indecent behaviour in any cathedral church, parish or district church or chapel of the Church of England, or in any chapel of any religious denomination, or [4] in England in any place of religious worship, duly certified under 18 & 19 Vict. c. 81, whether during the celebration of divine service or at any other time, or in any churchyard or burial ground; or

who molests, lets, disturbs, vexes, or troubles, or by any other unlawful means disquiets or misuses any preacher duly authorized to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite, or office in any cathedral, church, or chapel, or in any churchyard or burial ground.

[1] 52 Geo. 3, c. 155, s. 12.

[2] This Act was originally confined to all Protestant Dissenters other than Quakers, but was extended to all persons lawfully assembled for religious worship by 9 & 10 Vict. c. 59, s. 4.

[3] 23 & 24 Vict. c. 32, s. 2. This Act abolished the jurisdiction of the Ecclesiastical Courts over laymen for brawling.

[4] The Act extends to Ireland.

CHAPTER XVIII.

OFFENCES AGAINST MORALITY.

Article 168.

SODOMY.

[1] Every one commits the felony called sodomy, and is liable upon conviction thereof to penal servitude for life, as a maximum, and to penal servitude for ten years as a minimum punishment, who

(*a.*) Carnally knows any animal; or,

(*b.*) Being a male, carnally knows any man or any woman (per anum).

Any person above the age of fourteen years who permits himself or herself to be so carnally known as aforesaid is a principal in the first degree in the said felony.

Article 169.

ATTEMPT TO COMMIT SODOMY.

[2] Every one who attempts to commit sodomy is guilty of a misdemeanor, and is liable upon conviction thereof to ten years penal servitude as a maximum punishment.

Article 170.

ECCLESIASTICAL CENSURES FOR IMMORALITY.

[3] Every person who commits incest, adultery, fornication, or any other deadly sin (not punishable at common law), is

[1] 24 & 25 Vict. c. 100, s. 61; see cases in 1 Russ. Cr. (5th Ed.) 879–82. See Note X. As to carnal knowledge see Article 254, *post.*

[2] 24 & 25 Vict. c. 100, s. 62.

[3] 13 Edw. 1, c. 4; 53 Geo. 3, c. 127, ss. 1–3; and see Phillimore's Eccl. Law, 1081, 1442; also *Phillimore* v. *Machon*, 1 P. D. 481; Co. Litt. 96 b. Incest, though not mentioned in the statute "Circumspecté agatis," is the only offence which in these days is ever prosecuted under the law here stated. Such a prosecution occurred within the last few years in the Bishop of Chichester's Court.

liable upon conviction thereof in an ecclesiastical Court to be directed to do penance, and to be excommunicated, and to be imprisoned for such term not exceeding six months as the Court pronouncing the sentence of excommunication may direct.

Article 171.

PUBLIC INDECENCIES.

[1] Every one commits a misdemeanor who does any grossly indecent act in any open and public place in the presence of more persons than [2] one; but it is uncertain whether such conduct in a public place amounts to a misdemeanor if it is done when no one is present, or in the presence of one person only.

[3] A place is public within the meaning of this article if it is so situated that what passes there can be seen by any considerable number of persons if they happen to look.

Illustrations.

The following are instances of public places:—

[4] The inside of an omnibus;

[5] The roof of a house visible from the back windows of several houses;

[6] The inside of a urinal open to the public, and by the side of a footpath in Hyde Park;

[7] The inside of a booth on Epsom racecourse which the public were invited to enter.

Article 172.

OBSCENE PUBLICATIONS.

[8] Every one commits a misdemeanor who without justification,

[1] 1 Hawk. P. C. 358. The acts referred to are principally acts of open indecency, but an act scandalously profligate, though not in this sense openly indecent, might in some cases be a misdemeanor, as, *e.g.*, selling a wife. See *per* Lord Mansfield in *R.* v. *Delaval*, 3 Burr. 1438.

[2] *Elliot's Case*, L. & C. 103.

[3] *Webb's Case*, 1 Den. 338; *Holmes's Case*, Dears. 207; *R.* v. *Orchard*, 3 Cox, C. C. 248; *R.* v. *Rouverard*, stated by Parke, B. in *R.* v. *Webb*, 1 Den. 344.

[4] *R.* v. *Holmes*, Dears. 207.

[5] *Thallman's Case*, L. & C. 326.

[6] *R.* v. *Harris*, L. R. 1 C. C. R. 282.

[7] *R.* v. *Saunders*, 1 Q. B. D. 18.

[8] Note XI.; Strange, 790; and see 20 & 21 Vict. c. 83, s. 1; 14 & 15 Vict. c. 100, s. 29; Starkie (by Folkard), 603–12.

(*a*.) Publicly sells, or exposes for public sale or to public view, any obscene book, print, picture, or other indecent exhibition;

(*b*.) Publicly exhibits any disgusting object.

Any person convicted of the offence defined in clause (*a*) may be sentenced to hard labour.

(SUBMITTED.)—A person is justified in exhibiting disgusting objects, or publishing obscene books, papers, writings, prints, pictures, drawings, or other representations, if their exhibition or publication is for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published.

Illustrations.

(1.) [1] A exhibits for money, to all comers, an unnatural and monstrous birth. A commits a misdemeanor.

B exhibits a similar object to students of medicine only. B does not commit a misdemeanor.

(2.) [2] A, a bookseller, publishes the work of a casuist, which contains amongst other things obscene matter. The work is published in Latin, and appears from the circumstances of its publication to be intended for *bonâ fide* students of casuistry only. A has not committed a misdemeanor.

B extracts the obscene matter from the work so published, translates it into English, and sells it as a pamphlet about the streets for the purpose of throwing odium upon casuists. B has committed a misdemeanor.

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[1] *Harring* v. *Watson*, 1 Russ. Cr. (5th Ed.) 436.

[2] The second paragraph of this illustration is based upon *R.* v. *Hicklin*, L. R. 3 Q. B. 360; and see *Steele* v. *Brannan*, L. R. 7 C. P. 261. The first part is merely my suggestion as to what ought to be held to be the law if the question should arise, but the point cannot be called clear. Keating, J., referred, in passing, to the question in *Steele* v. *Brannan*, L. R. 7 C. P. 269, 270, but expressed no opinion upon it. I confine this article to obscenity because I have found no authority for the proposition that the publication of a work immoral in the wider sense of the word is an offence. A man might with perfect decency of expression, and in complete good faith, maintain doctrines as to marriage, the relation of the sexes, the obligation of truthfulness, the nature and limits of the rights of property, &c., which would be regarded as highly immoral by most people, and yet (I think) commit no crime. Obscenity and immorality in this wide sense are entirely distinct from each other. The language used in reference to some of the cases

Article 173.

DEFILING GIRLS UNDER AGE.

[1] Every one commits a misdemeanor and is liable upon conviction thereof to two years imprisonment with hard labour as a maximum punishment who, by false pretences, or false representations, or other fraudulent means, procures any woman or girl, under the age of twenty-one years, to have illicit carnal connection with any man.

Article 174.

CONSPIRACY TO DEFILE.

[2] Every one commits the misdemeanor of conspiracy who agrees with any other person to induce any woman to commit adultery or fornication, or to take any woman from the lawful custody of her parents, in order to marry her to any person without their consent:

(Submitted.) Provided, that an agreement between a man and a woman to commit fornication or adultery, or that the woman shall leave the lawful custody of her parents without their consent, in order to marry the man, is not a conspiracy.

Article 175.

PREVENTING THE BURIAL OF DEAD BODIES AND DISINTERRING THEM.

[3] Every one commits a misdemeanor who prevents the burial of any dead body, or who, without authority, disinters a dead body, even from laudable motives; or

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might throw doubt on this, but I do not think any instance can be given of the punishment of a decent and *bonâ fide* expression of opinions commonly regarded as immoral.

[1] 24 & 25 Vict. c. 100, s. 49.

[2] *R.* v. *Lord Grey*, 3 St. Tr. 519; 1 East, P. C. 460; *R.* v. *Mears*, 2 Den. 79; *R.* v. *Delaval*, 3 Burr. 1434

[3] *R.* v. *Vann*, 2 Den. 325. A man is bound to bury his child's body, and, I suppose, his wife's. In *R.* v. *Vann* Lord Campbell said, "A man is bound, if he has the means, to give his child Christian burial." This can hardly be a duty in

who, having the means, neglects to bury a dead body which he is legally bound to bury, provided that no one is legally bound to incur a debt for such a purpose; or

[1] who buries or otherwise disposes of any dead body on which an inquest ought to be taken, without giving notice to a coroner, or who, being under a legal duty to do so, fails to give notice to a coroner that a body on which an inquest ought to be held is lying unburied, before such body has putrified.

Illustrations.

(1.) [2] A digs up a dead body and sells it for purposes of dissection. This is a misdemeanor.

(2.) [3] A, without the consent of a dissenting congregation, to which a burial ground belonged, or of trustees having the legal estate therein, but with the leave of the person in charge, digs up his mother's coffin in order to bury it in his father's grave in a churchyard some miles off. This is a misdemeanor.

(3.) [4] A, a gaoler, refuses to deliver up for burial the dead body of a prisoner who had died in gaol to the executors, on the ground that the deceased person owed him money. This is a misdemeanor.

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the case of persons who are not Christians, but probably "Christian" means only decent. It appears from *R.* v. *Stewart*, 12 A. & E. 773, 779, that the person under whose roof another person dies is under a legal duty to carry the corpse, decently covered, to the place of burial if there is no one else who is bound to bury it.

[1] 1 Russ. Cr. 620 (5th Ed.) 7th Rep. C. L. C. pp. 50, 51.

[2] *R.* v. *Lynn*, 1 Lea, 497.

[3] *R.* v. *Sharpe*, D. & B. 160.

[4] *R.* v. *Scott*, 2 Q. B. 248 (in a note to *R.* v. *Fox*).

CHAPTER XIX.

COMMON NUISANCES—DISORDERLY HOUSES.

ARTICLE 176.

COMMON NUISANCE.

[1] A COMMON nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. It is immaterial whether the act complained of is convenient to a larger number of the public than it inconveniences, but the fact that the act complained of facilitates the lawful exercise of their rights by part of the public may show that it is not a nuisance to any of the public.

Illustrations.

(1.) [2] An electric telegraph company without legal authority erects a telegraphic pole in a permanent manner on the waste at the side of and forming part of a highway, leaving room enough for the use of the highway, and not affecting either the metalled road or the footpath by the side of it. This is a public nuisance, because a small portion of space which the public had a legal right to use is obstructed.

(2.) [3] A tramway laid down on a high road in such a manner as to obstruct to some extent the use of the road by common carriages is a public nuisance, although it may be convenient to a large majority of those who use the road.

(3.) [4] The public have a right to use the Tyne as a highway, and to anchor

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[1] 1 Hawk. P. C. 692. The question as to the public benefit of the act complained of may arise indirectly.

[2] *R.* v. *United Kingdom Telegraph Co.* 3 F. & F. 73.

[3] *R.* v. *Train*, 2 B. & S. 640.

[4] *R.* v. *Russel*, 6 B. & C. 566. I think this is the effect of the case, which deserves careful study. It is referred to in *R.* v. *Train*, but I doubt whether it is not misunderstood there. Lord Tenterden differed in it from Bayley and Holroyd, JJ. Of the eight counsel engaged seven became judges. *R.* v. *Betts*, 13 Q. B. 1022, refers to it in a manner which seems to me inadequate. The turning point of the case, as I understand it, is that the ships anchored under the spouts had a right to anchor there for a reasonable time to receive cargo,

ships therein for a reasonable time to take in cargoes of coal. A erects staiths and spouts at which ships moored for the purpose can take in coal, but which prevent ships not lying at them from sailing over part of the waterway where they would otherwise be able to sail. The fact that the arrangement is on the whole convenient with regard to the public use of the river may be considered by the jury in deciding whether the staiths are a nuisance or not.

(4.) The non-repair of a public highway is a public nuisance.

(5.) [1] A railway company makes a railway within five yards of an ancient public highway in such a manner that the locomotives frighten the horses of persons using the highway as a carriage road. The railway is made and the locomotives used under Acts of Parliament, which do not require the railroad company to screen the line from the road. This is not a public nuisance because the act done is warranted by law.

Article 177.

COMMON NUISANCE A MISDEMEANOR.

Every one who commits any common nuisance is guilty of a misdemeanor.

Article 178.

PUNISHMENT FOR KEEPING DISORDERLY HOUSES.

[2] Every one who keeps a disorderly house commits a common nuisance, and is liable upon conviction thereof to be sentenced to hard labour.

[3] Any person who appears, acts, or behaves as master or mistress, or as the person having the care, government, or management of any disorderly house, is to be deemed and taken to be the keeper thereof, and is liable to be prosecuted and punished as such, although, in fact, he is not the real owner or keeper thereof.

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and that the spouts being recognized by statute could not be regarded as in themselves illegal. The question on which the judges differed was whether Bayley, J., had influenced the jury by referring to the collateral advantage of cheapening coal in the London market. The effect of time in legalizing a nuisance is somewhat similar. It has not in itself that effect, but the fact that a given state of things is of very long standing may be evidence that it is not in fact a nuisance: see cases in 1 Russ. Cr. 421 and 442. The view taken by the Criminal Law Commissioners is rather different, see 7th Rep. p. 59.

[1] *R.* v. *Pease*, 4 B. & Ad. 30.

[2] 3 Geo. 4, c. 114, s. 1.

[3] 25 Geo. 2, c. 36, s. 8; 21 Geo. 3, c. 49, s. 2.

[1] But the owner of a house, conducted as a disorderly house by a person to whom he lets it as a weekly tenant, is not the keeper of the house merely because he knows the use to which it is put, and does not give his tenant notice to quit.

Article 179.

DISORDERLY HOUSES.

The following houses are disorderly houses, that is to say, common bawdy houses, common gaming houses, common betting houses, disorderly places of entertainment.

Article 180.

COMMON BAWDY HOUSES.

[2] A common bawdy house is a house or room, or set of rooms, in any house kept for purposes of prostitution. And it is immaterial whether indecent or disorderly conduct is or is not perceptible from the [3] outside.

Article 181.

COMMON GAMING HOUSES.

[4] A common gaming house is a house kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which

(i.) A bank is kept by one or more of the players, exclusively of the others; or

(ii.) In which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet.

[1] *R.* v. *Barrett*, L. & C. 263, and see *R.* v. *Stannard*, L. & C. 349, where the whole house was let in parts to different women as weekly tenants.

[2] 1 Russ. Cr. 443, see cases; *R.* v. *Pierson*, 2 Lord Raym. 1197; see also Chitty, and 3 Steph. Com. 353, n.

[3] *R.* v. *Rice & Wilton*, L. R. 1 C. C. R. 21.

[4] See Note XII. in Appendix; 33 Hen. 8, c. 9, s. 11; 8 & 9 Vict. c. 109, s. 2.

Article 182.

[1] COMMON BETTING HOUSES.

A common betting house is a house, office, room, or other place

(i.) Kept or used for the purpose of betting between persons resorting thereto and

The owner, occupier, or keeper thereof; or

Any person using the same; or

Any person procured or employed by, or acting for or on behalf of, any such person;[2] or

Any person having the care or management, or in any manner conducting the business thereof; or

(ii.) Kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration

for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise; or

as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency.

[3] Every common betting house is deemed to be a common gaming house.

Article 183.

EVIDENCE THAT A HOUSE IS A COMMON GAMING HOUSE.

The following circumstances are evidence (until the contrary is proved) that a house, room, or place is a common gaming-house, and that the persons found therein were unlawfully playing therein; that is to say,

(i.) [4] Where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game are found in any house, room, or place suspected to be used

[1] 16 & 17 Vict. c. 119, s. 1, preamble.

[2] "Any such person" = owner, occupier, keeper, or person using the same.

[3] Sect. 2.

[4] 8 & 9 Vict. c. 109, s. 8.

as a common gaming-house, and entered under a warrant or order issued under 8 & 9 Vict. c. 109, or about the person of any of those found therein.

(ii.) [1] Where any constable or officer authorized as aforesaid, to enter any house, room, or place, is wilfully prevented from, or obstructed, or delayed in entering the same or any part thereof, or where any external or internal door or means of access to any such house, room, or place so authorized to be entered is found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of delaying, preventing, or obstructing the entry into the house, or any part thereof, of any constable or officer authorized as aforesaid, or for giving alarm in case of such entry; or

If any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or for concealing, removing, or destroying any instruments of gaming.

Article 184.

DISORDERLY PLACES OF ENTERTAINMENT.

The following places are disorderly places of entertainment, that is to say—

(*a.*) [2] Every house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind in the cities of London and Westminster, or within twenty miles thereof, without a licence granted in compliance with the provisions of 25 Geo. 2, c. 36.

[3] This definition does not include the Theatres Royal in Drury Lane and Covent Garden, or the King's Theatre in the Haymarket, or any performance or public entertainment carried on under letters patent, or license from the Crown or the Lord Chamberlain.

(*b.*) [4] Every house, room, or other place opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever upon any part of the Lord's Day,

[1] 17 & 18 Vict. c. 38, s. 2.
[2] 25 Geo. 2, c. 36, s. 2.
[3] 25 Geo. 2, c. 36, s. 4.
[4] 21 Geo. 3, c. 49, s. 1.

called Sunday, and to which persons are admitted by the payment of money, or by tickets sold for money.

The following places are deemed to be places to which persons are admitted by the payment of money, although money is not taken in the name of or for admittance, that is to say, any house, room, or place—

(i.) [1] At which persons are supplied with tea, coffee, or other refreshments of eating or drinking on the Lord's Day at any greater price than the common and usual prices at which the like refreshments are commonly sold upon other days thereat, or at places where the same usually are sold.

(ii.) Any house, room, or place opened or used for any of the purposes aforesaid at the expense of any number of subscribers or contributors to the carrying on any such entertainment, or amusement, or debate, on the Lord's Day, and to which persons are admitted by tickets to which the subscribers or contributors are entitled.

Article 185.

DISORDERLY INNS.

[2] A disorderly inn is an inn kept in a disorderly manner and suffered to be resorted to by persons of bad character for any improper purpose.

Every person who keeps a disorderly inn, or who, being an innkeeper, refuses, without reasonable grounds, to entertain any person ready and willing to pay for entertainment therein, commits a misdemeanour.

Article 186.

LOTTERIES.

[3] Every person commits a common nuisance who [4] keeps a

[1] 21 Geo. 3, c. 49, s. 2.

[2] Precedent of indictment, 3 Chit. Crim. Law, 672–3. As to refusing entertainment see *R.* v. *Rymer*, 2 Q. B. D. 136.

[3] 10 Will. 3, c. 23, s. 1; 42 Geo. 3, c. 119, s. 2, and see *R.* v. *Crawshaw*, Bell, C. C. 303.

[4] "Keeps" = publicly or privately keep any office or place to exercise, keep open, show, or expose, to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little go, or any other lottery whatsoever.

lottery of any kind whatever without the authority of Parliament.

Article 187.

NUISANCES TO HEALTH, LIFE, AND PROPERTY.

[1] Every person commits a common nuisance who does anything which endangers the health, life, or property of the public or any part of it.

Publicly and wilfully exposing or causing to be exposed for sale articles of food unfit for consumption, and knowingly permitting servants to mix unwholesome ingredients in articles of food, are acts endangering the health or life of the public within the meaning of this article.

[2] Everything is deemed to endanger health, life, or property, which either causes actual danger thereto, or which must do so in the absence of a degree of prudence and care the continual exercise of which cannot be reasonably expected.

Illustrations.

(1.) [3] A carries a child infected with the small-pox along a public highway in which persons were passing, and near to inhabited houses. A commits a common nuisance.

(2.) [4] A permits his house standing by the highway to become so ruinous as to be likely to fall down, and to injure passengers. A commits a common nuisance.

(3.) [5] A burns down his own house, it being in a situation which makes such burning dangerous to others. A commits a common nuisance.

(4.) [6] A, a baker, under a contract to supply children at a military asylum with bread, delivers loaves into which his servant, to his knowledge, has introduced alum. A commits a common nuisance.

(5.) [7] A keeps in a warehouse in the City of London large quantities of a

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[1] See cases in Illustrations. The offences of being a common scold and of eavesdropping would fall under this head, but they may be regarded as practically obsolete.

[2] Illustration 5.

[3] *R.* v. *Vantandillo*, 4 M. & S. 73. So of bringing a glandered horse to a fair, *R.* v. *Hanson*, Dear. 24. An infected person exposing himself would commit the same offence.

[4] *R.* v. *Watson*, 2 Str. 1167.

[5] *R* v. *Probert*, 2 Ea. 1030. If there were an intent to injure or defraud, this would be felony. See article 377 (*a*.)

[6] *R.* v. *Dixon*, 3 M. & S. 11. See, too, *R.* v. *Crawley*, 3 F. & F. 109; *R.* v. *Jarvis*, 3 F. & F. 108.

[7] *Lister's Case*, 1 D. & B. C. C. 209.

mixture of spirits of wine and wood naptha, forming a substance more inflammable than gunpowder, and of such a nature that a fire lighted by it would be practically unquenchable. A commits a common nuisance, although he uses the most scrupulous care to avoid accidents.

ARTICLE 188.

NUISANCES BY OFFENSIVE TRADES.

[1] Every one commits a common nuisance who, for the purposes of trade or otherwise, makes loud noises, or offensive or unwholesome smells in such places and under such circumstances as to annoy any considerable number of persons in the exercise of rights common to all her Majesty's subjects.

ARTICLE 189.

NUISANCES TO HIGHWAYS.

Every one commits a common nuisance who obstructs any highway, by any permanent work or erection thereon or injury thereto, which renders the highway less commodious to the public than it would otherwise be; or who prevents them from having access to any part of it by an excessive and unreasonable temporary use thereof, or by so dealing with the land in the immediate neighbourhood of the highway as to prevent the public from using and enjoying it securely.

Illustrations.

Each of the following acts is a nuisance to a highway:

(1.) [2] Digging a ditch, or making a hedge across it, or ploughing it up.

(2.) [3] Allowing waggons to stand before a warehouse for an unreasonable time, so as to occupy great part of the street for several hours by day and night.

(3.) [4] Keeping up a hoarding in front of a house in a street for the purpose of repairs for an unreasonable time.

(4.) [5] Excavating an area close to a footpath, and leaving it unfenced.

(5.) [6] Blasting stone in a quarry so as to throw stones upon the houses and road.

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[1] 1 Russ. Cr. 436, &c.

[2] 1 Russ. Cr. 485.

[3] *R.* v. *Russel*, 6 East, 427.

[4] *R.* v. *Jones*, 3 Camp. 230.

[5] *Barnes* v. *Ward*, 9 C. B. 392.

[6] *R* v. *Mullins*, L. & C. 489.

ARTICLE 190.

NUISANCES TO BRIDGES.

[1] Every one is guilty of a common nuisance who, being bound by law to repair a bridge, leaves it unrepaired.

ARTICLE 191.

NUISANCES TO NAVIGABLE RIVERS.

[2] Every one is guilty of a common nuisance who wilfully diverts or obstructs the course of any navigable river [3] so as appreciably to diminish its convenience for purposes of navigation, even though the alteration may, upon the whole, be for the convenience of the public; [4] but the owner of a vessel wrecked in a navigable river is not guilty of a common nuisance because he does not remove it.

[1] 1 Russ. Cr. 541, 68, where the whole law as to the liability to repair different classes of bridges is discussed.

[2] 1 Russ. Cr. 531.

[3] *R.* v. *Randall*, C. & M. 496; *R.* v. *Russell*, 3 E. & B. 942.

[4] *R.* v. *Watts*, 2 Esp. 675; *White* v. *Crisp*, 10 Ex. 318; *Brown* v. *Mallett*, 5 C. B. 599. *White* v. *Crisp* and *Brown* v. *Mallett* are not altogether consistent on the further question as to the duty of the owner to buoy his vessel, or otherwise provide against other vessels striking on it.

CHAPTER XX.

VAGRANCY.

ARTICLE 192.

IDLE AND DISORDERLY PERSONS.

[1] AN idle and disorderly person is a person who

(*a.*) Being able, wholly or in part, to maintain himself or his family by work or otherwise, wilfully refuses or neglects so to do, by which refusal or neglect he or any of his family whom he may be legally bound to maintain becomes chargeable to any parish, township, or place; or

(*b.*) Who returns to, and becomes chargeable in any parish, township, or place whence he has been legally removed by order of two justices of the peace, unless he produces a certificate of the churchwardens and overseers of the poor of some other parish, township, or place, thereby acknowledging him to be settled in such other parish, township, or place; or

(*c.*) Who, being a petty chapman or pedlar, wanders abroad and trades without being duly licensed or otherwise authorized by law; or

(*d.*) Who, being a common prostitute, wanders in the public street or public highways or any place of public resort, and behaves in a riotous or indecent manner; or

(*e.*) Who wanders abroad, or places himself in any public place, street, highway, court, or passage, to beg or gather alms, or causes or procures any child so to do; or

(*f.*) [2] Who, being a pauper,

(i.) Absconds or escapes from, or leaves any casual ward before he is entitled to discharge himself therefrom; or

(ii.) Refuses to be removed to any workhouse or asylum under the provisions of the "Pauper Inmates Discharge and Regulation Act, 1871," (34 & 35 Vict. c. 108); or

[1] 5 Geo. 4, c. 83, s. 3.

[2] 34 & 35 Vict. c. 108, s. 7.

(iii.) Absconds or escapes from, or leaves any workhouse or asylum during the period for which he may be detained therein; or

(iv.) Refuses or neglects, whilst an inmate of any casual ward, workhouse, or asylum, to do the work or observe the regulations prescribed; or

(v.) Wilfully gives a false name, or makes a false statement for the purpose of obtaining relief.

ARTICLE 193.

ROGUES AND VAGABONDS.

[1] A rogue and vagabond is a person who

(*a.*) Commits any of the offences in the last article mentioned, after having been convicted as an idle and disorderly person; or

(*b.*) Pretends or professes to tell fortunes, or uses any subtle craft, means, or device, [2] by palmistry or otherwise, to deceive and impose on any of Her Majesty's subjects; or

(*c.*) Wanders abroad and lodges in any barn or outhouse, or in any deserted unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself; or

(*d.*) [3] Wilfully exposes to view in any street, road, highway, or public place, or in the window or other part of any shop, or other building situate therein, any obscene print, picture, or other indecent exhibition; or

(*e.*) Wilfully, openly, lewdly, and obscenely exposes his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female; or

(*f.*) Wanders abroad and endeavours, by the exposure of wounds or deformities to obtain or gather alms; or

[1] 5 Geo. 4, c. 83, s. 4.

[2] *i.e.*, "by palmistry, or by contrivances to deceive other than palmistry, provided they are of the same general character as is indicated by the earlier words of the statute," *per* Pollock, B., in *Monck* v. *Hilton*, 2 Ex. Div. 279. In this case the person convicted called himself a 'Spiritualist,' and had a fixed residence.

[3] 1 & 2 Vict. c. 38, s. 2.

(*g.*) Goes about as a gatherer or collector of alms, or endeavours to procure charitable contributions of any nature or kind under any false or fraudulent pretence; or

(*h.*) Runs away and leaves his wife and his or her child or children chargeable, or whereby she or they or any of them become chargeable to any parish, township, or place; or

(*i.*) [1] Plays or bets * in any street, road, highway, or other open and public place,† at or with any table or instrument of gaming,‡ at any game or pretended game of chance; or

(*j.*) Has in his custody or possession any picklock, key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coachhouse, stable, or outbuilding; or

(*k.*) Is armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or has upon him any instrument with intent to commit any felonious act; or

(*l.*) Is found in or upon any dwelling-house, warehouse, coachhouse, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose; or

(*m.*) Is a suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, or any avenue leading thereto, or any street, or any highway, or any place adjacent to a street or highway, with intent to commit felony;

[2] In proving the intent to commit a felony it is not necessary to shew that the person suspected was guilty of any particular act tending to shew his purpose or intent, and he may be convicted if, from the circumstances of the case, and from his known character as proved to the Court or justice before whom or which he is brought, it appears to such Court or justice that his intent was to commit a felony; or

(*n.*) Being apprehended as an idle and disorderly person, violently resists any constable or other peace officer so appre-

[1] 36 & 37 Vict. c. 38, s. 3, re-enacts this provision, adding at * "by way of wagering or gaming," at † "or in any open place to which the public have or are permitted to have access," and at ‡ "or any coin, cash, token, or other article used as an instrument of such wagering or gaming."

[2] 34 & 35 Vict. c. 112, s. 15.

hending him, and is subsequently convicted of the offence for which he was so apprehended; or

(*o.*) [1] Who, being a pauper, wilfully destroys or injures his own clothes, or damages any of the property of the guardians.

Article 194.

INCORRIGIBLE ROGUES.

[2] An incorrigible rogue is a person who

(*a.*) Breaks or escapes out of any place of legal confinement before the expiration of the term for which he is committed under Article 193; or

(*b.*) Is convicted as a rogue and vagabond after being previously so convicted; or

(*c.*) Being apprehended as a rogue and vagabond, violently resists any constable or peace officer so apprehending him, and is subsequently convicted of the offence for which he was apprehended.

Article 195.

PUNISHMENT OF ROGUES, VAGABONDS, ETC.

[3] Every one convicted before a justice of the peace

Of being an idle and disorderly person may be imprisoned with hard labour for any term not exceeding one month;

Of being a rogue and vagabond may be imprisoned with hard labour for any term not exceeding three months;

Of being an incorrigible rogue must be committed to prison and kept to hard labour till the next general or quarter sessions of the peace;

At the said sessions the justices may order such offender to be further committed to prison and to be there kept to hard labour for any term not exceeding one year, and if a male to be whipped.

[1] 34 & 35 Vict. c. 108, ss. 7, 10.
[2] 5 Geo. 4, c. 83, s. 5.
[3] 5 Geo. c. 83, ss. 3, 4. 5.

*PART V.

OFFENCES AGAINST THE PERSON, THE CONJUGAL AND PARENTAL RIGHTS, AND THE REPUTATION OF INDIVIDUALS.

CHAP. XXI.—Cases in which Infliction of Bodily Injury is not Criminal.

CHAP. XXII.—Of Culpable Negligence and of Duties tending to the Preservation of Life.

CHAP. XXIII.—Homicide.

CHAP. XXIV.—Murder—Manslaughter—Attempts to commit Murder—Concealment of Birth.

CHAP. XXV.—The Malicious Infliction of Bodily Injuries amounting to Felony.

CHAP. XXVI.—The Infliction of Bodily Injuries not amounting to Felony.

CHAP. XXVII.—Assaults, Aggravated and Common, punishable on Indictment.

CHAP. XXVIII.—Punishment of Assaults on Summary Conviction.

CHAP. XXIX.—Rape, etc.

CHAP. XXX.—Crimes affecting Conjugal and Parental Rights—Bigamy—Abduction.

CHAP. XXXI.—Offences against Children by Parents and Others.

CHAP. XXXII.—Libels on Private Persons.

CHAPTER XXI.

CASES IN WHICH INFLICTION OF BODILY INJURY IS NOT CRIMINAL.

Article 196.

EXCEPTIONS TO REST OF PART V.

The contents of Part V. are to be taken to be subject to the provisions contained in this chapter.

Article 197.

EXECUTION OF LAWFUL SENTENCES.

[1] The intentional infliction of death or bodily harm is not

* Note XIII.

[1] 1 Hale, P. C. 497; Foster, 267; 1 Hawk. P. C. 80; 1 East, P. C. 332–4. These authorities contain (*inter alia*) discussions as to varying the form of punishment (as by substituting beheading for hanging) little likely to be of practical value.

a crime when it is done in the execution, in the manner prescribed by law by a person whose duty it is to execute it, of a lawful sentence duly passed by a competent Court.

A Court which, but for some formal defect in its authority or in its proceedings, would have had jurisdiction to pass a sentence, is deemed for the purposes of this Article to be a competent Court; but a Court which has by law no jurisdiction at all over the case in which sentence is passed is not deemed to be a competent Court, and a mistaken belief on the part of the judge, or of the officer who executes the sentence, that it is competent, does not justify or excuse his act.

Illustrations.

(1.) [1] A sits under a commission of gaol delivery. The officer forgets to adjourn the Court at the end of the first day's sitting. This determines the commission. On the following day A sits again, and sentences a felon to death, who is duly executed by B. Neither A nor B is guilty of murder or manslaughter, though the proceedings are irregular.

(2.) [2] A, a lieutenant or other having commission of martial authority in time of peace, causes B to be hanged by C by colour of martial law. This is murder in both A and C.

ARTICLE 198.

SUPPRESSION OF RIOTS.

[3] The intentional infliction of death or bodily harm is not a crime when it is done either by justices of the peace, peace

[1] *Per* Lord Hale, 1 Hale, P. C. 499.

[2] Coke, 3rd Inst. 52; 1 Hale, P. C. 499, 500. The whole subject of martial law underwent full discussion in connection with the execution of Mr. Gordon by a court martial in Jamaica in 1865. An elaborate history of the case has been published by Mr. Finlason, and the charge to the grand jury, delivered at the Central Criminal Court by the Lord Chief Justice of England, has been published in a separate form. I know not whether the charge to the grand jury of Middlesex, delivered by Lord (then Mr. Justice) Blackburn, has been published or not. Much information on the subject will be found in Forsyth's Cases and Opinions on Constitutional Law, pp. 484–563. Mr. Forsyth prints, *inter alia*, an opinion given by the late Mr. Edward James, Q.C., and myself, in 1866, see pp. 551–563; and see *Phillips* v. *Eyre*, L. R. 6 Q. B. 11.

[3] See the charge of Tindal, C.J., to the grand jury of Bristol in 1832, printed in a note to *R.* v. *Pinney*, 5 C. & P. 261, and quoted and approved in *Phillips* v. *Eyre*, L. R. 6 Q. B. 15 (Court of Exchequer Chamber). The proper course in such cases is for the civil magistrate to direct and control what is done, but this is not absolutely necessary. The Riot Act (1 Geo. 1, st. 2, c. 5, see Article 74) authorises in express terms the dispersion of rioters who continue riotously assembled together for

officers, or private persons, whether such persons are, and whether they act as, soldiers under military discipline or not, for the purpose of suppressing a general and dangerous riot which cannot otherwise be suppressed.

Article 199.

PREVENTION OF THE COMMISSION OF CRIMES AND ARREST OF CRIMINALS.

The intentional infliction of death or bodily harm is not a crime when it is done by any person

[1] in order to prevent the commission of treason, murder, burglary, rape, robbery, arson, piracy, or any other felony in which the traitor, felon, or pirate so acts as to give the person who kills or wounds him reasonable ground to believe that he intends to accomplish his purpose by open force;

[2] or, in order to arrest a traitor, felon, or pirate, or retake or keep in lawful custody a traitor, felon, or pirate who has escaped, or is about to escape, from such custody, although such traitor, felon, or pirate offers no violence to any person;

[3] or, when it is done by a constable, or other officer of justice, in order to execute a warrant of arrest for treason or felony, which cannot otherwise be executed, although the person named in the warrant offers no violence to any person;

provided, in each of the said cases, that the object for which death or harm is inflicted, cannot be otherwise accomplished.

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more than an hour after the proclamation made, and indemnifies the persons concerned, if any of the rioters should be killed; but this Act appears to be narrower than the common law as laid down by Tindal, C.J.

[1] Coke, 3rd Inst. 55; 1 Hale, P. C. 486–7; Foster, 273 (more fully and satisfactorily); 1 Hawk. P. C. 82 (rather confusedly); 1 East, P. C. 271–4 (best and most fully stated); 1 Russ. Cr. 5th ed. 84 or 52 (taken substantially from East). Piracy is not mentioned by the authorities, but see 8 Geo. 1, c. 24, s. 6. Article 112.

[2] Coke, 3rd Inst. 56; 1 Hale, P. C. 489; 1 Hawk. P. C. 81; Foster, 270–1; 1 East, P. C. 298–302.

[3] Coke, 3rd Inst. 55; 1 Hale, P. C. 490; 1 Hawk. P. C. 81; 1 East, P. C. 298–302. It must be observed that this article is confined to the intentional infliction of death or bodily injury. If the death or injury is not an intended or probable consequence of the act, the case is provided for under Articles, 210, 222.

Article 200.

PRIVATE DEFENCE.

The intentional infliction of death or bodily harm is not a crime when it is inflicted by any person in order to defend himself or any other person from unlawful violence, provided that the person inflicting it observes the following rules as to avoiding its infliction, and inflicts no greater injury in any case than he in good faith, and on reasonable grounds, believes to be necessary when he inflicts it:—

(*a.*) [1] If a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself on the spot, and may kill or wound the person by whom he is assaulted.

(*b.*) [2] If a person is unlawfully assaulted,

(i.) In his own house;

(ii.) [3] In the execution of a duty imposed upon him by law;

(iii.) [3] By way of resistance to the exercise of force which he has by law a right to employ against the person of another;

he may defend himself on the spot, and may use a degree of force for that purpose proportioned to the violence of the aasault, and sufficient (in case iii.) to enable him not only to repel the attack made upon him, but to effect his original purpose; but a person using force in the execution of a duty imposed upon him by law, or in order to effect a purpose which he may by law effect in that manner, and not being assaulted, is not entitled to strike or hurt the person against whom he employs such force, merely because he is unable

[1] Coke, 3rd Inst. 55; 1 Hale, P. C. 482; 1 Hawk. P. C. 82; Foster, 273–5; 1 Russ. Cr. 849. This case is so nearly co-extensive with the first case mentioned in the last article that East does not notice them separately. Cases, however, may be imagined in which a sudden and violent assault would be no crime, and yet might be resisted by killing the assailant: see Illustration (1).

[2] Staundforde, 14a; Coke, 3rd Inst. 56; 1 Hale, P. C. 476, &c.; 1 Hawk. P. C. 87; Foster, 275–6; 1 East, P. C. 279–80.

[3] In addition to the authorities in the last note: see 1 East, P. C. 287, 307; 1 Hale, P. C. 486.

otherwise to execute such duty or fulfil such purpose, except in the cases provided for in Article 199.

(*c*.) [1] If a person is unlawfully assaulted by another without any fault of his own, and otherwise than in the cases provided for in clauses (*a*) and (*b*), but with a deadly weapon, it is his duty to abstain from the intentional infliction of death or grievous bodily harm on the person assaulting, until he (the person assaulted) has retreated as far as he can with safety to himself.

But any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm; and if the assault upon him is notwithstanding continued, he is in the position of a person assaulted in the employment of lawful force against the person of another.

(*d*.) [2] If two persons quarrel and fight neither is regarded as defending himself against the other until he has in good faith fled from the fight as far as he can; but if either party does in good faith flee from the fight as far as he can, and if, when he is prevented either by a natural obstacle or any other cause of the same nature, from flying farther, the other

[1] See the authorities quoted for clauses (*a*), (*b*), and (*c*), and especially 1 Hale, P. C. 481. The qualification at the end of this rule is founded on the doctrine that any one may lawfully prevent or suppress by force a breach of the peace or affray (1 Hawk. P. C. 489; *R.* v. *Osmer*, 5 East, 308), from which it would seem to follow that a man who is himself assaulted may arrest his assailant, and on the doctrine that *son assault demesne* is a good defence to an indictment for assault (1 Hawk. P. C. 110). If this were not the law it would follow that any ruffian who chose to assault a quiet person in the street might impose upon him the legal duty of running away, even if he were the stronger man of the two. The passage of Hale appears to me to be applicable only to cases where deadly weapons are produced by way of bravado or intimidation, a case which no doubt often occurred when people habitually carried arms and used them on very slight provocation. In such a case it might reasonably be regarded as the duty of the person assaulted to retreat rather than draw his own sword, but I cannot think that Hale meant to say that a man who in such a case closed with his assailant and took his sword from him would be acting illegally, or that if in doing so the assailant were thrown down and accidentally killed by the fall the person causing his death would be guilty of felony. The minuteness of the law contained in the authorities on which this article is founded is a curious relic of a time when police was lax and brawls frequent, and when every gentleman wore arms and was supposed to be familiar with the use of them. It might, I think, be simplified in the present day with advantage.

[2] See the authorities for clause (*b*).

party to the fight follows and again assaults him, the person who has so fled may defend himself, and may use a degree of violence for that purpose proportioned to the violence employed against him.

Illustrations.

(1.) [1] A, a madman, violently attacks B in such a manner as to cause instant danger to B's life. B may kill A, though A is not committing any crime.

(2.) [2] A, an officer, has a warrant to arrest B on civil process. B flies. A overtakes him, and B assaults A. A may use any degree of violence to B necessary to repel his assault and to arrest him.

(3.) [3] A, a trespasser, enters B's house and refuses to leave it. B has a right to remove A by force, but not to strike him even if he cannot otherwise get him out of the house. If on the application of such force A assaults B, B may use any degree of force necessary to defend himself and to remove A from the house.

ARTICLE 201.

LAWFUL FORCE.

[4] It is not a crime to inflict bodily harm by way of lawful correction, or by any lawful application of force (other than those hereinbefore mentioned) to the person of another; but if the harm inflicted on such an occasion is excessive, the act which inflicts it is unlawful, and, even if there is no excess, it is the duty of every person applying the force to take reasonable precautions against the infliction of other or greater harm than the occasion requires.

Illustrations.

(1.) [5] A, a schoolmaster, beats B, a scholar, for two hours with a thick stick. Such a beating is unlawful.

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[1] This seems to follow directly from the authorities cited. So, if A were under a mistake of fact which B had no time to explain.

[2] 1 East, P. C. 307.

[3] 1 Hale, P. C. 486.

[4] It would be inconsistent with the plan of this work to try to enumerate all the cases in which force may be lawfully applied to the person of another. In 1 Russ. Cr. 856–60, cases will be found as to excessive violence in executing legal process: *R.* v. *Hunter*, Str. 499, p. 857. Pressing for the sea service (p. 859). Captains in the merchant service: *R.* v. *Leggetts*, 8 C. & P. 191 (p. 860). Correction of children and servants (861–4).

[5] *R.* v. *Hopley*, 1 Russ. Cr. 751; 2 F. & F. 202.

(2.) [1] A kicks B, a trespasser, out of his house, in order to force him to leave it. B is killed. The kick is an unlawful act.

(3.) (SUBMITTED.) A, the governor of a gaol, flogs B, a criminal, under the sentence of a court. It is A's duty to cause the surgeon of the gaol to be in attendance to see that no unintended injury is inflicted on B.

ARTICLE 202.

SUPERIOR ORDERS TO EMPLOY FORCE.

In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior, but the fact that he did so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders.

Illustrations.

(1.) [2] A, a marine, is ordered by his superior officer on board a man-of-war to prevent boats from approaching the ship, and has ammunition given him for that purpose. Boats persisting after repeated warnings in approaching the ship A fires at one and kills B. This is murder in A, although he fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship [though desirable for the maintenance of discipline.]

(2.) [3] A, the driver of an engine, orders B, the stoker (whose duty it is to obey his orders), not to stop the engine. The train runs into another in consequence, and C is killed. B is justified by A's order.

(3.) [4] (SUBMITTED.) A, a civil magistrate, directs B, a military officer, to

[1] *Wild's Case*, 1 Russ. Cr. 5th ed. 686; 2 Lewin, 214.

[2] *R.* v. *Thomas*, 1 Russ. Cr. 823; 4 M. & S. 441.

[3] *R.* v. *Trainer*, 4 F. & F. 105; 1 Russ. Cr. (5th ed.) 837, 838. The language of Willes, J., in this case seems to be a little too wide, unless it is taken in connection with the particular facts.

[4] Whether C would commit a military offence if he refused to obey B's order because he rightly thought it unreasonable, is a question which would have to be decided by a court martial. I should suppose that cases might be imagined in which even a court martial would hold that a military inferior might and ought to disobey orders on the ground of their illegality. An officer, *e.g.*, who commanded his men to fire a volley down Fleet Street when there was no appearance

order his men to fire into a mob. B gives the order. It is obeyed, and C, a common soldier, shoots D dead. The question whether A, B, and C respectively committed any offence depends on the question whether each of them respectively had reasonable grounds to believe and did in fact believe in good faith that what they did was necessary to suppress a dangerous riot. A's direction to B, and B's order to C, would not necessarily justify B or C in what they did, but would be facts relevant to the question whether they believed upon reasonable grounds as aforesaid.

ARTICLE 203.

CONSENT TO BODILY INJURY.

The consent of a person killed or maimed to the infliction of death or bodily harm, affects the criminality of such infliction to the extent defined in Articles 204-209, both inclusive. In each of these articles the word "Consent," means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents.

Consent is said to be given freely when it is not procured by force, fraud, or threats of whatever nature.

ARTICLE 204.

RIGHT TO CONSENT TO BODILY INJURY FOR SURGICAL PURPOSES.

[1] Every one has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself or upon any child under his care, and too young to exercise a reasonable discretion in such a matter, but such consent does not discharge the person performing the operation from the duties hereinafter defined in relation thereto.

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of a disturbance, or to shoot a child of four years old running away during a riot, or to desert to the enemy, or to shoot a superior officer, ought to be disobeyed, and I suppose that a soldier who obeyed such an order might be punished by a court martial. That such acts as shooting peaceable people wantonly, or a child of four years old intentionally, even in a riot, would be murder as well in the soldier as in the officer cannot be doubted. If so, it seems impossible to suggest any other principle as to the effect of superior orders than the one mentioned in the text. It is indeed essential to the maintenance of the supremacy of the common law over military force.

[1] I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their truth.

Article 205.

SURGICAL OPERATION ON PERSON INCAPABLE OF ASSENT.

(Submitted)—[1] If a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature and for similar objects, it is not a crime to perform such operation or to inflict such bodily harm upon him without his consent or in spite of his resistance.

Illustrations.

(1.) A is rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

(2.) If the accident made him mad, the amputation in spite of his resistance would be no offence.

(3.) B is drowning and insensible. A, in order to save his life, pulls B out of the water with a hook which injures him. This is no offence.

Article 206.

RIGHT TO CONSENT TO BODILY INJURY SHORT OF MAIM.

[2] Every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim. A maim is bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened, but a bodily injury is not a maim merely because it is a disfigurement.

Illustration.

(1.) It is a maim to strike out a front tooth. It is not a maim to cut off a man's nose. Castration is a maim.

Article 207.

NO RIGHT TO CONSENT TO INFLICTION OF DEATH.

No one has a right to consent to the infliction upon him-

[1] See note 1, p. 128.

[2] The positive part of this article is proved thus:—Injuries short of maims are not criminal at common law unless they are assaults, but an assault is inconsistent with consent. As to the definition of a maim, see 1 Hawk. P. C. 107. He expressly mentions castration.

self of death, or of an injury likely to cause death, in any case (other than those mentioned in Article 204), or to consent to the infliction upon himself of bodily harm amounting to a maim, for any purpose injurious to the public.

Illustrations.

(1.) [1] A and B agree to fight a duel together with deadly weapons. If either is killed or wounded his consent is immaterial.

(2.) [2] A gets B to cut off A's right hand, in order that A may avoid labour and be enabled to beg. Both A and B commit an offence.

Article 208.

NO RIGHT TO CONSENT TO INJURY CONSTITUTING A BREACH OF THE PEACE.

[3] No one has a right to consent to the infliction of bodily harm upon himself in such a manner as to amount to a breach of the peace, or in a prize fight or other exhibition calculated to collect together disorderly persons.

Article 209.

CONSENT TO BEING PUT IN DANGER.

[4] It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another.

[1] *R.* v. *Barronet*, Dear. 51. The law has never, I believe, been disputed. It is also immaterial whether the duel is or is not what is called fair. See, too, authorities as to suicide, Article 227.

[2] 1 Inst. 107 a, b. I think the qualification in the Article, "for any purpose injurious to the public," must be supplied. It seems absurd to say that if A gets a dentist to pull out a front tooth of A's because it is unsightly, though not diseased, A and the dentist both commit a misdemeanour. When it was an essential part of a common soldier's drill to bite cartridges I believe that it was not an uncommon military offence to get the front teeth pulled out, and this would, I presume, be an offence at common law also.

[3] Foster, 260; 1 East, 270; *R.* v. *Billingham*, 2 C. & P. 234; *R.* v. *Perkins*, 4 C. & P. 537.

[4] There is, so far as I know, no authority on this point, but the principle on which prizefights have been held to be illegal might include such a case. Such an exhibition might also under circumstances be a public nuisance. To collect a large number of people to see a man put his life in jeopardy is a less coarse and boisterous proceeding than a prizefight, but is it less immoral?

Illustration.

(1.) A, with B's consent, wheels B in a barrow along a tight rope at a great height from the ground. C hires A and B to do so, D E and F pay money to C to see the performance. B is killed.

Quære, are A, C, D, E, and F, or any and which of them, guilty of manslaughter?

ARTICLE 210.

ACCIDENTAL INFLICTION OF BODILY INJURY BY LAWFUL ACT—WHAT ACTS ARE LAWFUL.

[1] It is not a crime to cause death or bodily harm accidentally by an act which is not unlawful, unless such act is accompanied by an omission, amounting to culpable negligence, as defined in Article 211, to perform a legal duty imposed either by law or by contract on the person who does the act.

An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.

The words "unlawful act" include—

(i.) Acts punishable as crimes [or involving penalties];

(ii.) [2] Acts constituting actionable wrongs;

(iii.) [3] Acts contrary to public policy or morality, or injurious to the public.

Other acts are not unlawful within the meaning of this Article, though they may involve private immorality.

Illustrations.

(1.) [4] A, a schoolmaster, corrects a scholar in a manner not intended or

[1] 1 Hale, 471, &c.; Foster, 258; 1 East, P. C. 260; 1 Russ. Cr. (5th ed.) 844. I cannot give any precise authority as to acts involving penalties.

[2] 1 Russ. Cr. 849–56, for cases; see especially the summing up of Tindal, C.J., in 1 Lew. 179; 1 Russ. Cr. 154. Hale, East, and Foster make a distinction between *mala in se* and *mala prohibita*, which I think can no longer be regarded as law.

[3] See authorities for Article 208.

[4] 1 Hale, 473. The same law of course applies to all cases of lawful correction. It would also, I think, apply to Illustration (2), and to all other cases in which force is lawfully applied by one person to the person of another. It is, of course, impossible in a work like this to attempt an enumeration of those cases.

likely to injure him, using due care. The scholar dies. Such a death is accidental.

(2.) [1] A turns B, a trespasser, out of his house, using no more force than is necessary for that purpose. B resists, but without striking A. They fall in the struggle and B is killed. Such a death is accidental.

(3.) [1] A, a workman, throws snow from a roof, giving proper warning. A passenger is nevertheless killed. Such a death is accidental.

(4.) [2] A takes up a gun, not knowing whether it is loaded or not, points it in sport at B and pulls the trigger. B is shot dead. Such a death is not accidental. If A had had reason to believe that the gun was not loaded the death would have been accidental, although he had not used every possible precaution to ascertain whether the gun was loaded or not.

(5.) [3] A seduces B, who dies in her confinement. The seduction though an immoral, is not an unlawful act, within the meaning of this Article.

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[1] Founded on Foster, 262.

[2] Founded on Foster, 263. In one of the cases referred to in Foster, the prisoner was convicted of manslaughter, although he had tried the pistol with the rammer. Foster, with reason, thinks this "an extremely hard case." *Dixon* v. *Bell*, 5 M. & S. 198, may be taken as illustrating the line between negligence, for which a man is civilly, and negligence for which he is criminally responsible. A in this case had caused the priming to be taken from a loaded gun, and left it in a place where a little girl playing with it shot a little boy. The boy recovered damages against A, but if he had died I do not think A would have been guilty of felony. The case is just on the line.

[3] No one ever suggested that this would be manslaughter, but it exactly marks the distinction between illegality and immorality.

CHAPTER XXII.

OF CULPABLE NEGLIGENCE AND OF DUTIES TENDING TO THE PRESERVATION OF LIFE.

ARTICLE 211.

DEATH OR BODILY INJURY CAUSED BY OMISSION TO DISCHARGE A LEGAL DUTY.

[1] EVERY one upon whom the law imposes any duty, or who has by contract or by any wrongful act taken upon himself any duty, tending to the preservation of life, and who neglects to perform that duty, and thereby causes the death of [[2] or bodily injury to] any person, commits the same offence as if he had caused the same effect by an act done in the state of mind, as to intent or otherwise, which accompanied the neglect of duty.

Provided, that no one is deemed to have committed a crime only because he has caused the death of or bodily injury to another by negligence which is not culpable. What amount of negligence can be called culpable is a question of degree for the jury, depending on the circumstances of each particular case.

Provided, also, that no one is deemed to have committed

[1] The first part of this article is illustrated by all the Illustrations of the other articles in the chapter. The whole subject is treated at great length in Wharton on Homicide, chapter iv. § 72, p. 166. Dr. Wharton classifies negligent homicide under the following heads (generalities apart):

1. Use of dangerous things.
2. Dropping things on roads.
3. Management of railroads and steamers.
4. Riding and driving.
5. The care of dangerous animals.
6. The care of children, &c.
7. The care of medical men.
8. Dangerous machinery.
9. Athletic sports.
10. Conclusion.

I have carefully gone through the whole chapter, and I think the whole of it is only a set of illustrations of the principles stated in this and in the concluding articles of the preceding chapter. It should be observed that the word "negligence" excludes intention. The very slightest omission of caution in order to cause death, would constitute malice aforethought, if death were caused thereby.

[2] I submit that this is so, but I am not aware of an express authority upon the point.

a crime by reason of the negligence of any servant or agent employed by him.

Illustrations.

(1.) [1] It is A's duty, by contract, as the banksman of a colliery shaft, to put a stage on the mouth of the shaft in order to prevent loaded trucks from falling down it. A omits to do so either carelessly or intentionally. A truck falls down the shaft and kills B. A is in the same position as if he had pushed the truck down the shaft carelessly or intentionally.

(2.) [2] A slings a cask in a manner which is reasonably sufficient for public safety. The cask slips and kills B. A is not criminally responsible merely because he omitted to take further precautions.

(3.) [3] A leaves an unloaded gun leaning against a wall in a friend's room. In his absence B loads it and leaves it loaded where he found it. A points it in sport at C and pulls the trigger. The gun goes off and kills C. A is not criminally responsible merely because he did not examine the gun before he pulled the trigger.

(4.) [4] A, the captain of a steamer, sets B to keep a look out. B fails to do so, whereby the steamer runs down a smack and drowns C. A is not criminally responsible for B's omission to look out.

(5.) [5] A, acting as a surgeon, physician, or midwife, causes the death of a patient by improper treatment, arising from ignorance or inattention. A is not criminally responsible, unless his ignorance, or inattention, or rashness is of such a nature that the jury regard it as culpable under all the circumstances of the case. It makes no difference whether A is or is not a properly qualified practitioner.

(6.) [6] A, by his servants, makes fireworks in his house contrary to the provisions of an Act of Parliament. The servants by culpable negligence cause an explosion which kills B. A is not criminally responsible for B's death.

ARTICLE 212.

CAUSING DEATH BY OMISSIONS OTHER THAN THOSE MENTIONED IN ARTICLE 211.

[7] It is not a crime to cause death or bodily injury, even

[1] *R.* v. *Hughes*, D. & B. 248.

[2] *Rigmaiden's Case*, 1 Lew. 180. Probably in such a case there would be a civil liability; see *Byrne* v. *Boulder*, 2 H. & C. 722.

[3] Foster, 265.

[4] *R.* v. *Allen*, 7 C. & P. 153; *R.* v. *Green*, 7 C. & P. 156.

[5] *R.* v. *Van Butcher*, 3 C. & P. 129; *R.* v. *St. John Long* (1st case), 4 C. & P. 398; (2nd case) 4 C. & P. 423; *R.* v. *Williamson*, 3 C. & P. 635.

[6] *Bennett's Case*, Bell, C. C. 1.

[7] *R.* v. *Smith*, 2 C. & P. 449. This subject is discussed in a striking manner by Lord Macaulay in his notes on the Indian Penal Code; see, too, Wharton on Homicide, § 72.

intentionally, by any omission other than those referred to in the last article.

Illustration.

(1.) A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.

ARTICLE 213.

DUTY TO PROVIDE NECESSARIES OF LIFE.

[1] Every person under a legal duty, whether by contract or by law, or by the act of taking charge, wrongfully or otherwise, of another person, to provide the necessaries of life for such other person, is criminally responsible for the neglect of that duty, if the person to whom the duty is owing, is, from age, health, insanity, or any other cause, unable to withdraw himself from the control of the person from whom it is due, but not otherwise.

Illustrations.

(1.) [2] A neglects to provide proper food and lodging for her servant, B (who is of weak mind, but twenty-three years old), B's life is shortened by such neglect. A is criminally responsible if B was in such an enfeebled state of body and mind as to be helpless and unable to take care of herself, or was under the dominion and restraint of A, and unable to withdraw herself from A's control; otherwise not.

(2.) [3] B, a girl of eighteen, comes from service to the house of her mother, A, and is there confined of a bastard child. A does not provide a midwife, in consequence of which B dies. A is not criminally responsible for this omission.

(3.) [4] A persuades B, an aged and infirm woman, to live in his house, and causes her death by neglecting to supply her properly with food and fire, she being incapable of providing for herself from age and infirmity. A is criminally responsible for his neglect.

ARTICLE 214.

DELEGATION OF DUTY DEFINED IN ARTICLE 213.

If a person delegates the discharge of the duty mentioned in the last article to his wife or to a servant, and supplies

[1] See cases in Illustrations. Some duties of this sort are imposed by statute. See Articles 264, 5, 6.

[2] *R.* v. *Charlotte Smith*, L. & C. 607.

[3] *R.* v. *Shepherd*, L. & C. 147.

[4] *R.* v *Marriott*, 8 C. & P. 425.

such wife or servant with the means of discharging the duties so delegated, it is the legal duty of such wife or servant to discharge such duties, and it is the legal duty of the man who delegates them to use ordinary care to see that they are properly discharged.

Illustration.

[1]A, the sister of B's deceased wife, acts as B's housekeeper, and neglects to give to B's infant child food duly provided by B, and so causes its death. A is criminally responsible for this neglect. If B knew of A's neglect, and permitted her to continue it, he also is responsible, but not otherwise.

ARTICLE 215.

WHEN DIRECT PERFORMANCE OF DUTY IMPOSSIBLE.

[2]It is the legal duty of a person who is unable to provide for any person necessaries which he is legally bound to provide for him to make application to the proper authorities for parochial relief in cases in which such authorities are legally bound to furnish such relief.

ARTICLE 216.

DUTY OF CARE IN DOING DANGEROUS ACTS.

It is the legal duty of every one who does any act which without ordinary precautions is, or may be, dangerous to human life, to employ those precautions in doing it.

Illustrations.

(1.) [3]It is the duty of persons having charge of dangerous things, animals or machinery, to take care of them.

(2.) [3]Workmen are employed to throw snow off the roof of a house. It is their duty to see whether people are passing, and to give warning before they throw it down.

(3.) [3]It is the duty of people riding, driving, or sailing, to be careful.

(4.) [4]A turns out a vicious horse to graze on a common on which people

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[1] *R.* v. *Bubb*, 4 Cox, C. C. 455, 1 Russ. Cr. 681; *R.* v. *Hook*, 4 Cox, 455, 1 Russ. Cr. 682.

[2] *R.* v. *Mabbett*, 5 Cox, C. C. 339, 1 Russ. Cr. 683.

[3] Cases collected in "Wharton on Homicide," §§ 87–93, 99, 125, 107–124; and see 1 Russ. Cr. 864–880.

[4] *R.* v. *Dant*, L. & C. 567.

are likely to pass. It is his duty to take proper precautions against its injuring passers by.

Article 217.

DUTY OF PERSONS DOING ACTS REQUIRING SPECIAL SKILL OR KNOWLEDGE.

[1] It is the legal duty of every person who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act of a dangerous character, and which requires special knowledge, skill, attention, or caution, to employ in doing it a common amount of such knowledge, skill, attention and caution.

[1] *R.* v. *St. John Long*, 4 C. & P. 404. (Per Garrow, B.) As to caution, see *R.* v. *St. John Long*, 2nd Case, 4 C. & P. 440; see other cases collected in 1 Russ. Cr. (5th ed.) 572–3.

CHAPTER XXIII.

HOMICIDE.

ARTICLE 218.

HOMICIDE DEFINED—WHEN A CHILD BECOMES A HUMAN BEING.

HOMICIDE is the killing of a human being by a human being.

[1] A child becomes a human being within the meaning of this definition, when it has completely proceeded in a living state from the body of its mother, [2] whether it has or has not breathed, [3] and whether the navel string has or has not been divided, [4] and the killing of such a child is homicide, whether it is killed by injuries inflicted before, during, or after birth.

[5] A living child in its mother's womb, or a child in the act of birth, even though such child may have breathed, is not a human being within the meaning of this definition, and the killing of such a child is not homicide.

ARTICLE 219.

KILLING DEFINED.

[6] Killing is causing the death of a person by an act or omission but for which the person killed would not have died when he did, and which is directly and immediately connected with his death. The question whether a given

[1] *R.* v. *Poulton*, 5 C. & P. 329.

[2] *R.* v. *Brain*, 6 C. & P. 349.

[3] *R.* v. *Trilloe*, Car. & Mar. 650.

[4] Authorities collected, 1 Russ. Cr. (5th Ed.) 646.

[5] *R.* v. *Enoch*, 5 C. & P. 539, and see note to the case; *R.* v. *Wright*, 9 C. & P. 754; *R.* v. *Seller*, 7 C. & P. 850.

[6] Dr. Wharton's work on Homicide contains an interesting and elaborate chapter (ch. xii. §§ 358–389), entitled "Causal Connection," into which some discussion is introduced on the distinction between causes and conditions; a distinction of which Dr. Wharton maintains, and of which Mr. Mill (see his Logic, vol. i.

act or omission is directly and immediately connected with the death of any person is a question of degree dependent upon the circumstances of each particular case.

(SUBMITTED.) But the conduct of one person is not deemed for the purposes of this Article to be the cause of the conduct of another, if it affects such conduct only by way of supplying a motive for it, and not so as to make the first person an accessory before the fact to the act of the other.

This Article is subject to the provisions contained in the next two Articles.

Illustrations.

(1.) [1] A substitutes poison for medicine, which is to be administered to C by B. B innocently administers the poison to C, who dies of it. A has killed C.

(2.) [2] A gives a poisoned apple to his wife B, intending to poison her. B, in A's presence, and with his knowledge, gives the apple to C, their child, whom A did not intend to poision. A not interfering, C eats the apple and dies. A has killed C.

(3.) [3] A, an ironfounder, ordered to melt down a saluting cannon which had burst, repairs it with lead in a dangerous manner. Being fired with an ordinary charge, it bursts and kills B. A has killed B.

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p. 398, &c.) denies the solidity. For practical purposes, I think the Article in the text is sufficient. And if this were the proper place, I should be disposed to discuss some of Dr. Wharton's positions. The latter part of the Article and the Illustration (6) intended to explain it, must, I think, be law; but I know of no direct authority on the subject. The maxim "In jure non remota causa sed proxima spectatur" has no doubt a bearing on the subject (see Bacon's Maxims, 35–9, and Broom's Maxims, 216–30), but it is very vague. Lord Bacon says it does not apply to "criminal acts except they have a full interruption," His illustration is,—A fires a pistol at B, and misses him, and runs away. B pursues A. A stabs B with a dagger. "If the law should consider the last impulsive cause, it should say it was in his own defence, but the law is otherwise, for it is but a pursuance and execution of the first murderous intent." Surely in this case the stab is the immediate cause of B's death; A's state of mind is another matter, and is to be inferred from facts. The law as to accessories and incitement appears to show the limit to which participation in a crime can be carried. Unless the line is drawn there it is impossible to say how far it would extend. Illustration (6) is a prosaic version of Othello; or, to take a humbler instance, of the catastrophe of Oliver Twist. Iago and Fagin received poetical rather than legal justice.

[1] *Donellan's Case.* See my Gen. View, Cr. L. 338.

[2] *Saunders' Case*, 1 Hale, P. C. 436.

[3] *R.* v. *Carr*, 8 C. & P. 163.

(4.) [1] A, B, and C, road trustees under an Act of Parliament, and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract, whereby the road gets out of repair, and D passing along it is killed. A, B, and C have not killed D.

(5.) [2] A by his servants makes fireworks in a house in London contrary to the provisions of an Act of Parliament (9 & 10 Wm. 3, c. 77). Through the negligence of his servants, and without any act of his, a rocket explodes and sets fire to another house whereby B is killed. A has not killed B.

(6.) A tells B facts about C in the hope that the knowledge of those facts will induce B to murder C, and in order that C may be murdered; but A does not advise B to murder C; B murders C accordingly. A has not caused C's death within the meaning of this Article.

Article 220.

WHEN AN ACT IS THE REMOTE CAUSE OF DEATH OR ONE OF SEVERAL CAUSES.

A person is deemed to have committed homicide, although his act is not the immediate or not the sole cause of death in the following cases—

(*a.*) [3] If he inflicts a bodily injury on another which causes surgical or medical treatment, which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith, and with common knowledge and skill, but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith, or was so employed without common knowledge or skill.

(*b.*) [4] If he inflicts a bodily injury on another, which would not have caused death if the injured person had submitted to proper surgical or medical treatment, or had observed proper precautions as to his mode of living.

(*c.*) [5] If by actual violence or threats of violence he causes a person to do some act which causes his own death, such act being a mode of avoiding such violence or threats, which

[1] *R.* v. *Pocock*, 17 Q. B. 34.
[2] *R.* v. *Bennett*, Bell, C. C. 1.
[3] 1 Hale, 418; 1 Ex. 344; Illustrations (1), (2).
[4] Illustration (3).
[5] Illustration (4).

under the circumstances would appear natural to the person injured.

(*d.*) [1] If by any act he hastens the death of a person suffering under any disease or injury which apart from such act would have caused death.

(*e.*) [2] If his act or omission would not have caused death unless it had been accompanied by the acts or omissions of the person killed or of other persons.

Illustrations.

(1.) [3] A wounds B in a duel. Competent surgeons perform an operation which they in good faith regard as necessary. B dies of the operation, and it appears that the surgeons were mistaken as to the necessity for the operation. A has killed B.

(2.) [4] A gives B a wound. C, a surgeon, applies poison to the wound, either from bad faith or by negligence. B dies of the poison. C and not A has killed B.

(3.) [5] A injures B's finger. B is advised by a surgeon to allow it to be amputated, refuses to do so, and dies of lockjaw. A has killed B.

(4.) [6] A violently beats and kicks B, his wife, on the edge of a pond. She, to avoid his violence, throws herself into the pond and is drowned. A has killed B.

(5.) [7] A strikes B, who is at the time so ill that she could not possibly have lived more than six weeks if she had not been struck. B dies earlier than she would otherwise have died in consequence. A has killed B.

(6.) [8] A and B, the drivers of two carts, race along a high road. C is lying drunk in the middle of the road. One or other or both of the carts run over C and kill him. In either case both A and B have killed C.

(7.) [9] It is the duty of A to put up air headings in a colliery where they are required. It is the duty of B to give A notice where an air heading is required. But A has means, apart from B's report, of knowing whether

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[1] 1 Hale, 428; Illustration (5).

[2] See Illustrations (6) and (7). See also *R.* v. *Longbottom*, 1 Russ. Cr. (5th Ed.) 830; 3 Cox, 439. *R.* v. *Ledger*, 1 Russ. Cr. (5th Ed.) 835, 6; and Mr. Greaves' note. This case is a very peculiar one.

[3] *R.* v. *Pym*, 1 C. C. C. 339; 1 Russ. Cr. 702.

[4] Founded on 1 Hale, 428.

[5] *R.* v. *Holland*, 2 Moo. & Ro. 357.

[6] *R.* v. *Evans*, 1 Russ. Cr. (5th Ed.) 651; *R.* v. *Wager*, tried at Derby Summer Assizes, 1864, was precisely similar. See, upon this subject, Wharton on Homicide, §§ 374–5. If the intention was to escape further ill usage by suicide, the case would be altered.

[7] *R.* v. *Fletcher*, 1 Russ. Cr. 703.

[8] *R.* v. *Swindall*, 2 C. & K. 230.

[9] *R.* v. *Haines*, 2 C. & K. 368.

such air headings are required or not. A omits to put up an air heading. B omits to give A notice that one is wanted. An explosion follows, and C is killed. Both A and B have killed C.

Article 221.

WHEN CAUSING DEATH DOES NOT AMOUNT TO HOMICIDE.

A person is not deemed to have committed homicide, although his conduct may have caused death, in the following cases:

(*a.*) [1] When the death takes place more than a year and a day after the injury causing it. In computing the period the day on which the injury is inflicted is to be counted as the first day;

(*b.*) [It is said] [2] When the death is caused without any definite bodily injury to the person killed, but this does not extend to the case of a person whose death is caused not by any one bodily injury, but by repeated acts affecting the

[1] 1 East, P. C. 343, 4; 1 Russ. Cr. (5th Ed.) 673, 4.

[2] 1 Hale, 429. Lord Hale's reason is that "secret things belong to God; and hence it was that before 1 Ja. 1, c. 12, witchcraft or fascination was not felony, because it wanted a trial" (i.e. I suppose because of the difficulty of proof). I suspect that the fear of encouraging prosecutions for witchcraft was the real reason of this rule. Dr. Wharton rationalizes the rule thus: "Death from nervous causes does not involve penal consequences." This appears to me to substitute an arbitrary quasi scientific rule for a bad rule founded on ignorance now dispelled. Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him, might not this be murder? Suppose a man kills a sick person intentionally, by making a loud noise which wakes him when sleep gives him a chance of life; or suppose knowing that a man has aneurism of the heart, his heir rushes into his room, and roars in his ear, "Your wife is dead!" intending to kill and killing him, why are not these acts murder? They are no more "secret things belonging to God" than the operation of arsenic. As to the fear that by admitting that such acts are murder, people might be rendered liable to prosecution for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct, gradually "breaking a man's heart," could never be the "direct or immediate" cause of death. If it was, and it was intended to have that effect, why should it not be murder? In *R.* v. *Towers*, 12 C. C. C. 530, a man was convicted before Denman, J., of manslaughter, for frightening a child to death (see Wharton on Homicide, § 372, on this case).

Lord Hale doubts whether voluntarily and maliciously infecting a person of the plague, and so causing his death, would be murder (i. 432). It is hard to see why. He says that "infection is God's arrow." A different view was taken in the analogous case of *R.* v. *Greenwood*, 1 Russ. Cr. 100, 7 Cox, C. C. 404. As to the proviso, see Illustration (1).

body, which collectively cause death, though no one of them by itself would have caused death;

(*c.*) [It seems] [1] When death is caused by false testimony given in a court of justice.

Illustrations.

(1.) [2] A by a long series of acts of ill-treatment, no one of which by itself would cause death, causes the death of B. A has killed B.

(2.) [3] A and B, in order to get a reward, offered for the conviction of highway robbers, conspire together to bring a false accusation of highway robbery against C, whereby C is convicted and executed. A and B do not kill C.

ARTICLE 222.

WHEN HOMICIDE IS UNLAWFUL.

[4] HOMICIDE is unlawful,

(*a.*) When death is caused by an act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and when such act is neither justified nor excused by the provisions contained in Chapter III., or Chapter XXI.;

(*b.*) When death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm;

(*c.*) When death is caused accidentally by an unlawful act.

[1] Illustration (1).

[2] *R.* v. *Self*, 1 East, P. C. 226, 7, and 1 Russ. Cr. 677; *R.* v. *Squire*, 1 Russ. Cr. 678.

[3] *R.* v. *MacDaniel and Others*, 19 S. T. 746, and see particularly the note 810–4, and Foster, 131, 2.

[4] This article sums up the result of the preceding chapters. See Note XIII.

CHAPTER XXIV.

MURDER—MANSLAUGHTER—ATTEMPTS TO COMMIT MURDER —CONCEALMENT OF BIRTH.

ARTICLE 223.

MANSLAUGHTER AND MURDER DEFINED.

[1] MANSLAUGHTER is unlawful homicide without malice aforethought.

Murder is unlawful homicide with malice aforethought.

Malice aforethought means any one or more of the following states of minds preceding or co existing with the act or omission by which death is caused, and [2] it may exist where that act is unpremeditated.

(*a.*) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not;

(*b.*) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(*c.*) An intent to commit any felony whatever;

(*d.*) An intent to oppose by force any officer of justice on

[1] For the authorities for this Article see Note XIV.

[2] Coke's first case of implied malice is malice implied from the want of provocation. A man who wantonly or on a slight cause intentionally and violently kills another, shows by that act, not indeed the existence of hatred of long standing, but the existence of deadly hatred instantly conceived and executed, which is at least as bad if not worse. This in the strict sense of the words is malice aforethought. As Hobbes well observes: "it is malice forethought, though not long forethought." (Dialogue of the Common Laws, "Works," vi. 85). And it is not by law necessary that it should be long. If a slight provocation does not reduce murder to manslaughter, *à fortiori*, the total absence of all provocation, and the mere rapidity with which the execution of a cruel and wicked design follows on its conception cannot have that effect. For cases of slight provocation, see 1 Russ. Cr. 712, and cases there collected.

his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed.

The expression "officer of justice" in this clause includes every person who has a legal right to do any of the acts mentioned, whether he is an officer or a private person.

Notice may be given, either by words, by the production of a warrant, or other legal authority, by the known official character of the person killed, or by the circumstances of the case.

This article is subject to the provisions contained in Articles 224–226, both inclusive, as to the effect of provocation.

Illustrations.

(1.) [1] A, knowing that B is suffering from disease of the heart, and intending to kill B, gives B a slight push, and thereby kills B. A commits murder.

(2.) [1] A in the last illustration pushes B unlawfully, but without knowledge of his state of health or intention to kill him, or do him grievous bodily harm. A commits manslaughter. If A laid his hand gently on B to attract his attention, and by doing so startled and killed him, A's act would be no offence at all.

(3.) [2] A finding B asleep on straw, lights the straw, meaning to do B serious injury, but not to kill him. B is burnt to death. A commits murder.

(4.) [3] A waylays B, intending to beat, but not intending to kill him or do him grevious bodily harm. A beats B and does kill him. This is manslaughter at least, and may be murder if the beating were so violent as to be likely, according to common knowledge, to cause death.

(5.) [4] A strikes at B with a small stick, not intending either to kill or to do him grievous bodily harm. The blow kills B. A commits manslaughter.

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[1] I know of no direct authority for these Illustrations, but they follow directly from the principles stated in the note.

[2] *Errington's Case*, 2 Lewin, 217.

[3] Fost. 259.

[4] *Rowley's Case*, Fost. 294, remarking on earlier reporters; and see 1 Russ. Cr. 717, where some other cases are given.

(6.) [1] A, recently delivered of a child, lays it naked by the side of the road and wholly conceals its birth. It dies of cold. This is murder or manslaughter, according as A had or had not reasonable ground for believing that the child would be preserved.

(7.) [2] It is A's duty to put a stage at the mouth of the shaft of a colliery. He omits to do so. A truck falls down the shaft in consequence and kills B. If by omitting to erect the stage A intended that B's death should be caused, A is guilty of murder. If the omission was caused only by the culpable negligence of A, and without any intention to kill or injure B, or a reckless disregard to the chance of his being killed, A is guilty of manslaughter.

(8.) [3] A, for the purpose of rescuing a prisoner, explodes a barrel of gunpowder in a crowded street and kills a number of persons, intending to explode the barrel of powder in the crowded street. A commits murder, although he may have no intention at all about the people in the street, or may hope that they will escape injury.

(9.) [4] A shoots at a domestic fowl, intending to steal it, and accidentally kills B. A commits murder.

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[1] *R.* v. *Walters*, C. & M. 164, and 1 Russ. Cr. 675. This case appears to me to illustrate the true doctrine on the subject better than the old and often quoted case of the woman who left her child in a place where it was struck by a kite and killed. The point of that case I take to be that the striking by a kite was an occurrence sufficiently likely to impose upon the mother the duty of guarding against it. Kites having been almost exterminated in England their habits are forgotten. But to lay a child on the ground in Calcutta would be to expose it to almost certain and speedy death from kites and other birds of prey. I have myself been struck by a kite which had just struck at one of my children.

[2] *R.* v. *Hughes*, D. & B. 248.

[3] *R.* v. *Desmond, Barrett, and Others.* In this case Lord Chief Justice Cockburn said, "If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to take life, yet if it were such that life was necessarily endangered by it—if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it," that was murder: *Times* Report, Apr. 28, 1868. It is singular that this case is noticed in Cox's Reports only for the sake of a point about evidence not the least worth reporting: see 11 Cox, 146. The case of *R.* v. *Allen and Others*, the Fenians executed after the Manchester Special Commission in 1867, is not, so far as I know, reported, except in 17 L. T. (N.S.) 223, which reprints the letters printed in Note XV.

[4] Fost. 258–9, and see note. This dictum (which is supported by many other authorities) was followed by Lord Chief Justice Cockburn in *Barrett's Case.* He said, "If a person seeking to commit a felony should in the prosecution of that purpose cause, although it might be unintentionally, the death of another, that, by the law of England, was murder. There were persons who thought and maintained that where death thus occurred, not being the immediate purpose of the person causing the death, it was a harsh law which made the act murder. But the Court and jury were sitting there to administer law, not to make or mould it, and the law was what he told them:" *Times*, Ap. 28, 1868.

(10.) [1] A, from wanton mischief, throws stones down a coal-pit and knocks away a scaffolding. The absence of the scaffolding causes an accident by which B is killed. A commits manslaughter.

(11.) [2] A, a thief, pursued by B, a policeman, who wishes to arrest A, trips up B, who is accidentally killed. A commits murder.

(12.) [3] A, having words with his wife, B, strikes her on the head with a pestle, and kills her. A commits murder, though the act was not premeditated.

(13.) [4] A, being called names by B, a woman, throws a broomstick at her, which happens to kill her. A commits manslaughter.

(14.) [5] A shoots at B, intending to kill him, and kills C. A commits murder.

Article 224.

Effect and definition of provocation.

Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm.

The following acts may, subject to the provisions contained in Article 225, amount to provocation :—

(*a.*) [6] An assault and battery of such a nature as to inflict actual bodily harm, or great insult, is a provocation to the person assaulted.

(*b.*) [7] If two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel, and whichever strikes the first blow.

[1] *R.* v. *Fenton*, 1 Lewin, 179; 1 Russ. Cr. 854.

[2] 1 Russ. Cr. 732–8 for a large collection of cases and authorities. See, too, 1 Hale, 456, 460; no distinction is taken in any of these cases as to the manner in which death is caused.

[3] 1 Russ. Cr. 712.

[4] Founded on 1 Hale, 455–6. The judges doubted whether the case was murder or manslaughter, and no judgment was delivered, but the prisoner was pardoned. This would no doubt be held to be manslaughter at the present day.

[5] Fost. 261; 1 Russ. Cr. 739.

[6] 1 Russ. Cr. 713.

[7] *Lord Byron's Case*, 11 S. T. 1177; *R.* v. *Walters*, 11 S. T. 114; and 1 Russ. Cr. 727–32 and 790, where other cases are cited.

(*c.*) [1] An unlawful imprisonment is a provocation to the person imprisoned, but not to the bystanders, though an unlawful imprisonment may amount to such a breach of the peace as to entitle a bystander to prevent it by the use of force sufficient for that purpose. An arrest by officers of justice, whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to bystanders.

(*d.*) [2] The sight of the act of adultery committed with his wife is provocation to the husband of the adulteress on the part both of the adulterer and of the adulteress.

(*e.*) [3] The sight of the act of sodomy committed upon a man's son is provocation to the father on the part of the person committing the offence.

(*f.*) [4] Neither words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation, within this article, except [perhaps] words expressing an intention to inflict actual bodily injury, accompanied by some act which shows that such injury is intended; [5] but words used at the time of an assault—slight in itself—may be taken into account in estimating the degree of provocation given by a blow.

(*g.*) [6] The employment of lawful force against the person of another is not a provocation to the person against whom it is employed.

Illustrations.

(1.) [7] A, a woman, gives B, a soldier, a slap in the face. A has not given B provocation within this article.

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[1] For the first part of the clause see *Buckner's Case*, 1 Russ. Cr. 785; *R.* v. *Withers*, Ibid. For the latter part, compare *Huggett's Case*, *Sir H. Ferrer's Case*, *Tooley's Case*, and *Adey's Case*, with Foster's remarks on *Tooley's Case*; 1 Russ. Cr. 753–7. See also 1 Hawk. P. C. 489; *R.* v. *Osmer*, 5 Ea. 308. Also Illustration (5), and Note XV.

[2] Cases cited, 1 Russ. Cr. 786. I am not aware that it has ever been decided that adultery by the husband is provocation to the wife.

[3] *R.* v. *Fisher*, 8 C. & P. 182.

[4] 1 East, P. C. 232; 1 Russ. Cr. 711, 784.

[5] 1 Russ. Cr. 711, note v.; *Lord Morley's Case*, 1 Hale, P. C. 455; *R.* v. *Sherwood*, 1 C. & K. 536.

[6] Illustration (12).

[7] *Stedman's Case*, Fos. 292.

(2.) [1] A, a woman, strikes B, a soldier, with a heavy clog violently in the face and wounds him. A has given B provocation within this article.

(3.) [2] A pulls B by the nose. A has given B provocation within the meaning of this article.

(4.) [3] A attempts to arrest B on an irregular warrant and in an irregular way. B shoots A dead. This is manslaughter by reason of the provocation given by B to A.

(5.) [4] A arrests B under an irregular warrant and conveys him to gaol. C, D, and others attempt to rescue B. A resists, and one of the party shoots A dead. This is murder in C, D and all their party.

(6.) [5] A and B, armed with swords, quarrel, draw their swords, and fight. Each give the other provocation.

(7.) [6] A and B quarrel, and agree together to fight, and do fight, a duel next day. Neither gives the other such provocation as would reduce the offence to manslaughter if either is killed.

(8.) [7] A and B quarrel, and upon the spot agree to fight with their fists. A, from the beginning of the fight, uses a knife and kills B. A has not received such provocation from B as reduces his offence to manslaughter.

(9.) [8] A and B quarrel, and agree to fight with their fists. In the course of the fight A snatches up a knife, which happens to be near, and which he has not previously provided, and kills B. A has received such provocation from B as reduces his offence to manslaughter.

(10.) [9] A, at a tavern, throws a bottle at B's head and draws his sword. B throws a bottle at A's head. A kills B. A has not received such provocation from B as reduces his offence to manslaughter.

(11.) [10] A and B quarrel and fight in a public-house. A leaves the public-house, says he will kill B, conceals a sword under his coat, returns to the public-house, tempts B to strike him with a stick, saying, "Stand off, or I'll stab you;" and without giving B time to retreat, does stab him mortally. A does not receive from B such provocation as reduces his offence to manslaughter.

(12.) [11] A attacks B in such a manner as to endanger B's life. B drives off and pursues A. A in self-defence kills B. This is murder in A.

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[1] *Stedman's Case*, Fos. 292.

[2] 1 East, P. C. 233.

[3] *R.* v. *Stevenson*, 19 St. Tr. 846. This case must be understood to be subject to the provisions of the next Article.

[4] This is the case of the Fenians executed at Manchester in 1867, for shooting Brett, a police constable in charge of a police van containing a Fenian prisoner. See Note XV.

[5] *R.* v. *Walters*, 12 St. Tr. 113; and see *R.* v. *Lord Byron*, 11 St. Tr. 177.

[6] *R.* v. *Cuddey*, 1 C. & K. 210; *R.* v. *Barronet*, and *R.* v. *Barthelemy*, Dears. 51 and 60, are recent cases of duelling.

[7] *R.* v. *Anderson*, 1 Russ. Cr. 731.

[8] Ibid.

[9] *R.* v. *Mawgridge*, Kel. 128–9; Foster, 295-6.

[10] *Mason's Case*, Foster, 132.

[11] Bacon's Maxims, 37, 8. I suppose B is trying to arrest A.

Article 225.

WHEN PROVOCATION DOES NOT EXTENUATE HOMICIDE.

[1]Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received, and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind.

Illustrations.

(1.) [2]A and B violently quarrel, and throw bottles at each other at a tavern, A throwing the first bottle. The company interfering, they remain quiet for an hour, B wishing to be reconciled. A refuses, and says he will have B's blood. When B and the rest of the company leave, A calls B back in terms of insult, and fights with him with swords; B is killed. A commits murder, though the fight is on equal terms.

(2.) [3]B strikes A with his fist. A, being the stronger man of the two throws B down on the ground, and beats out his brains with a poker. A commits murder.

(3.) [4]A and B quarrel and fight. B, getting the best of the fight leaves A. A throws a coal-pick at B and injures him, and then wounds him with a knife. B leaves the house, saying to A, "You have killed me." A says to a third person, "I will have my revenge." B returns to the house soon afterwards and A stabs him again, and kills him. A has committed murder.

(4.) [5]A is turned out of a house and kicked by B. A runs to his own house, between 200 and 300 yards off, returns with a knife, and meeting B, stabs him after walking quietly with him some yards. A then runs back and puts his knife in its usual place. The deliberation shown in fetching and replacing the knife are facts to be considered by the jury in deciding whether or not A committed the offence whilst deprived of self-control by passion.

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[1] See the cases quoted in the Illustrations, and *R.* v. *Lynch*, 5 C. & P. 324.

[2] *R.* v. *Oneby*, 2 Str. 766; 1 Russ. Cr. 730–1.

[3] Per Parke, B. in *R.* v. *Thomas*, 7 C. & P. 817.

[4] *R.* v. *Kirkham*, 8 C. & P. 115.

[5] *R.* v. *Hayward*, 6 C. & P. 157.

(5.) [1] Police-officers in charge of a police-van have in custody D, a person charged with felony under 11 Vict. c. 12. A, B, and C and others assault the van in concert, rescue the prisoner, and shoot one of the policemen dead with a pistol. The warrant under which D was in custody was informal, but not to the knowledge of A, B, and C. A, B, and C, and the others are guilty of murder, and it would have made no difference if they had known of the irregularity of the warrant.

ARTICLE 226.

PROVOCATION TO THIRD PERSON.

[2] Provocation to a person by an actual assault or by a mutual combat, or by a false imprisonment, is in some cases provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for his defence. But it is uncertain how far this principle extends.

ARTICLE 227.

SUICIDE—ABETTING SUICIDE.

[3] A person who kills himself in a manner which in the case of another person would amount to murder is guilty of murder, and every person who aids and abets any person in so killing himself is an accessory before the fact, or a principal in the second degree in such murder.

ARTICLE 228.

MANSLAUGHTER ON ONESELF.

[4] A person cannot commit manslaughter on himself.

[1] This is the case of *R.* v. *Allen and Others*, the Fenians, who murdered Brett, the policeman. See Note XV.

[2] 1 Russ. Cr. (5th Ed.), 704–5. The passage referred to is taken from Hawkins. See *Cary's Case* (p. 705), which is this: "A and B were fighting in a field in a quarrel. C, A's kinsman, casually riding by and seeing them in fight and his kinsman one of them, rode in, drew his sword, thrust B through and killed him. Coke, C.J., and the rest of the Court agreed that this is clearly but manslaughter in him (i. e. C) and murder in the other, for the one may have malice and the other not." I should have said C's offence was infinitely worse than A's, and I do not think this case would be followed in the present day.

[3] 1 Hale, P. C. 411–419. See *R.* v. *Fretwell*, L. & C. 161; *R.* v. *Russell*, 1 Mood. 356.

[4] *Per* Pollock, C.B., and Williams, J., in *R.* v. *Burgess*, L. & C. 258, referring to Jervis on Coroners, App. p. 322, note 4.

ARTICLE 229.

ACCESSORIES BEFORE THE FACT IN MANSLAUGHTER.

It seems that there may be accessories before the fact in manslaughter if the act or omission by which death is caused is not such an act or omission as, but for provocation received by the offender, would have been murder.

Illustration.

[1] A advises B to give C a strong dose of medicine to make him feel sick and uncomfortable. B does so and C dies. B is guilty of manslaughter, and A is accessory before the fact to manslaughter.

ARTICLE 230.

PRESUMPTION THAT KILLING IS MURDER.

[2] Every person who kills another is presumed to have wilfully murdered him, unless the circumstances are such as to raise a contrary presumption.

The burden of proving circumstances of excuse, justification, or extenuation is upon the person who is shown to have killed another.

ARTICLE 231.

PUNISHMENT OF MURDER.

[3] Every one who commits murder is guilty of felony, and must on conviction thereof be sentenced to death,

[1] *Per* Bramwell, B., in *R.* v. *Gaylor*, D. & B. 291. The text is stated doubtfully because the question has never been positively decided: Coke (3rd Inst. 55), Hale (2 P. C. 437) and East (1 P. C. 218) say that there can be no accessories before the fact in manslaughter; but the doctrine on the subject is very differently understood in these days. See *R.* v. *Taylor*, L. R. 2 C. C. R. 148. That unlawful killing with a deliberate intent to do slight bodily harm, which happens to cause death, is manslaughter is a comparatively modern doctrine. By Coke's definition it would be murder. Whatever it is called there may obviously be an accessory before the fact to such an act.

[2] 1 Russ. Cr. 668; *R.* v. *Greenacre*, 8 C. & P. 35.

[3] 24 & 25 Vict. c. 100, s. 3.

[1] and the judgment must direct that his body shall be buried within the precincts of the prison in which he shall have been last confined after conviction.

Article 232.

PUNISHMENT OF MANSLAUGHTER.

[2] Every one who commits manslaughter is guilty of felony and liable to a maximum punishment of penal servitude for life, or to a fine.

Article 233.

ATTEMPTS TO COMMIT MURDER.

[3] Every one is guilty of felony, and is liable upon conviction thereof to penal servitude for life as a maximum punishment, who does any of the following things with intent to commit murder; that is to say—

(*a.*) [4] administers any poison or other destructive thing to any person, or causes any such poisonous thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken;

(*b.*) [5] by any means whatever wounds or causes any grievous bodily harm to any person;

(*c.*) [6] shoots at any person, or, by drawing a trigger or in any other manner, attempts to discharge at any person [7] any kind of loaded arms;

[1] 24 & 25 Vict. c. 100, s. 3. Probably the latter part of the section would be held if the case arose to be merely directory, so that its omission would not render the sentence void. See *R.* v. *Wyate*, R. & R. 230, decided on an analogous provision in 25 Geo. 2, c. 37, ss. 4, 7. The execution must in this case be private. See 31 Vict. c. 24.

[2] 24 & 25 Vict. c. 100, s. 5.

[3] Ibid. ss. 11–15.

[4] Ibid. ss. 11 & 14, S.

[5] Ibid. s. 11, S. In *R.* v. *Gray*, D. & B. 303, it was held that to cause congestion of the lungs by exposing a child in a field was not causing "a bodily injury dangerous to life" within 7 Will. 4 & 1 Vict. c. 85, s. 2, but a case would now fall under clause (*b.*) s. 15. See remark of Cockburn, C.J., p. 306.

[6] Ibid. s. 14, S.

[7] "Loaded arms" means arms loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, although the attempt to discharge the same may fail from want of proper priming or any other cause, s. 19.

(*d.*) [1] attempts to drown, suffocate, or strangle any person;

(*e.*) [2] destroys or damages any building by the explosion of gunpowder or other explosive substance;

(*f.*) [3] sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel, or furniture thereof, or to any goods or chattels being therein;

(*g.*) [4] casts away or destroys any vessel;

(*h.*) [5] or who attempts to commit murder by any means other than those specified in clauses *a*—*g*, both inclusive;

(*i.*) [6] or who is accessory after the fact to any murder.

Article 234.

Threats and conspiracies to murder.

Every one is liable to a maximum punishment of ten years penal servitude who commits either of the following offences, the first of which is a felony and the others misdemeanors; that is to say—

(*a.*) [7] whoever maliciously sends, delivers, or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person;

(*b.*) [8] all persons who conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not;

(*c.*) [9] every one who solicits, encourages, persuades, endeavours to persuade, or proposes to any person to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not.

[1] 24 & 25 Vict. c. 100, s. 14, S.

[2] Ibid. s. 12, S.; *R.* v. *St. George*, 9 C. & P. 483; 1 Russ. Cr. 982.

[3] Ibid. s. 13, S.

[4] Ibid.

[5] Ibid. s. 15, S. This does not apply to attempts to commit suicide: *R.* v. *Burgess*, L. & C. 258.

[6] Ibid. s. 67.

[7] Ibid. s. 16, S. W.

[8] Ibid. s. 4.

[9] Ibid. s. 4.

Article 235.

CONCEALING THE BIRTH OF CHILDREN.

[1] Every person is guilty of a misdemeanor, and is liable upon conviction thereof to two years imprisonment and hard labour as a maximum punishment, who, if any woman is delivered of a child, endeavours to conceal the birth thereof by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth.

[2] The expression "delivered of a child" does not include delivery of a fœtus which has not reached the period at which it might have been born alive.

[3] The words "secret disposition of the body" include cases in which the body is placed in a situation where it is not likely to be found except by accident, or upon search, although the body is in no way concealed from any one who happens to go to that place.

[1] 24 & 25 Vict. c. 100, s. 60 (verbally altered).

[2] *R.* v. *Berriman*, 6 Cox, C. C. 388.

[3] *R.* v. *Brown*, L. R. 1 C. C. R. 244. The Act seems to be defective in punishing only the secret disposition of the body, and not the disposing of the body in such a way as to conceal the fact that it was born of its mother. If a woman were to leave a child's body by night in the middle of a street, or to drop it by day in a crowd of people, there would be an effectual concealment of the birth, but would there be a "secret disposition" of the body? Under the old Act 9 Geo. 4, c. 31, s. 14, it was held that a temporary concealment of the body with intent to remove it afterwards to some other place was within the words "secret burying or otherwise disposing": *R.* v. *Perry*, Dear. 471. This would seem to be so *à fortiori* under the present law.

CHAPTER XXV.

THE MALICIOUS INFLICTION OF BODILY INJURIES AMOUNTING TO FELONY.

ARTICLE 236.

WOUNDINGS AND ACTS ENDANGERING LIFE PUNISHABLE WITH PENAL SERVITUDE FOR LIFE.

EVERY one is guilty of felony, and liable to penal servitude for life as a maximum punishment, who does any of the following things unlawfully and maliciously; that is to say—

(*a.*) [1] who, with intent to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or to resist or prevent the lawful apprehension or detainer of any person,

by any means whatsoever wounds or causes any grievous bodily harm to any person, or shoots at any person, or [2] by drawing a trigger, or in any other manner, attempts to discharge at any person any kind of loaded arms;

(*b.*) [3] or who shoots at any vessel or boat belonging to Her Majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or

(*c.*) [3] maliciously shoots at, maims, or wounds any officer of the army, navy, or marines, being duly employed in the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty; or

(*d.*) [4] who, with intent to enable himself or any other

[1] 24 & 25 Vict. c. 100, s. 18, S.

[2] But not by attempting to draw a trigger: *R.* v. *St. George*, 9 C. & P. 483.

[3] 39 & 40 Vict. c. 36, s. 193. The word "unlawfully" is not in this section.

[4] 24 & 25 Vict. c. 100, ss. 21 & 22.

person to commit, or with intent to assist any other person in committing, any indictable offence,

[1] attempts by any means whatsoever to choke, suffocate, or strangle any other person, or attempts by any means calculated to choke, suffocate, or strangle, to render any other person insensible, unconscious, or incapable of resistance;

[2] or [3] administers to any person any chloroform, laudanum, or other stupefying or overpowering [4] matter, or [3] attempts to do so;

(*e.*) [5] or who burns, maims, disfigures, disables, or does any grievous bodily harm to any person by the explosion of gunpowder or other explosive substance;

(*f.*) [6] or who, with intent to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, causes any gunpowder or other explosive substance to explode, or

sends or delivers, or causes to be taken or received by any person, any explosive substance or other dangerous or noxious thing or puts or lays at any place or casts or throws at or upon or otherwise applies to any person any corrosive fluid or destructive or explosive substance;

(*g.*) [7] or who, with intent to endanger the safety of any person travelling, or being upon any railway,

puts or throws [8] anything upon or across any railway, or

takes up, removes, or displaces any rail, sleeper, or other matter or thing belonging to any railway, or

turns, moves, or diverts any points or other machinery belonging to any railway, or

[1] 24 & 25 Vict. c. 100, s. 21. An offender against this section is liable, if a male of whatever age, to be thrice privately whipped in addition to the other punishments specified above: 26 & 27 Vict. c. 44, s. 1, and see Article 12 (*d*), as to the manner of inflicting the punishment.

[2] Ibid. s. 22. The word "maliciously" does not apply to this section.

[3] "Applies or administers to, or causes to be taken by, or attempts to apply or administer to or attempts to cause to be administered to or taken by."

[4] "Drug, matter, or thing."

[5] 24 & 25 Vict. c. 100, s. 28, S. W.

[6] Ibid. s. 29, S. W.

[7] Ibid. s. 32, W.

[8] "Any wood, stone, or other matter or thing."

makes or shows, hides or removes, any signal or light upon or near any railway, or does or causes to be done any other matter or thing;

(*h.*) [1] or who [2] throws [3] anything at any [4] carriage used upon any railway with intent to injure or endanger the safety of any person therein or thereon, or in or upon any other [4] carriage forming part of the same train;

(*i.*) [5] or who prevents or impedes any person being on board of or having quitted any ship or vessel in distress, wrecked, stranded, or cast on shore, in his endeavour to save his life, or prevents and impedes any person in his endeavour to save the life of any person so situated;

(*j.*) [6] or who, being a woman with child, unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means whatsoever with intent to procure her own miscarriage;

(*k.*) [7] or who, with intent to procure the miscarriage of any woman whether she be or be not with child, unlawfully administers to or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent.

Article 237.

BLOWING UP BUILDINGS AND SHIPS WITH INTENT TO INJURE—FOURTEEN YEARS PENAL SERVITUDE.

[8] Every one is guilty of felony, and is liable on conviction to a maximum punishment of fourteen years penal servitude, who, with intent to do any bodily injury to any person, unlawfully and maliciously places or throws any gunpowder

[1] 24 & 25 Vict. c. 100, s. 33.

[2] Throws, or causes to fall, or strike at, against, into, or upon.

[3] Any wood, stone, or other matter or thing.

[4] Engine, tender, carriage, or truck.

[5] 24 & 25 Vict. c. 100, s. 17, S.

[6] Ibid. s. 58, S. A person who gives another a drug to be taken in the absence of the giver "causes it to be taken," and, it would seem, "administers" it, though absent when it is taken: *R.* v. *Wilson*, D. & B. 127, and cases referred to in the argument; also *R.* v. *Farrow*, D. & B. 164.

[7] Ibid. s. 58, S.

[8] Ibid. s. 30, S. W.

or other explosive substance in, into, upon, against, or near any building, ship, or vessel, whether or not any explosion takes place, and whether or not any bodily injury is effected.

Article 238.

ADMINISTERING POISON WITH INTENT TO HARM—TEN YEARS PENAL SERVITUDE.

[1] Every one is guilty of felony, and is liable upon conviction to a maximum punishment of ten years penal servitude, who unlawfully and maliciously administers to, or causes to be administered to, or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm.

[1] 24 & 25 Vict. c. 100, s. 23.

CHAPTER XXVI.

THE INFLICTION OF BODILY INJURIES NOT AMOUNTING TO FELONY.

ARTICLE 239.

MALICIOUS WOUNDING AND SIMILAR ACTS PUNISHABLE WITH FIVE YEARS PENAL SERVITUDE.

EVERY one commits a misdemeanor and is liable to a maximum punishment of five years penal servitude, who

(*a.*) [1] unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person either with or without any weapon or instrument;

(*b.*) [2] or who unlawfully and maliciously administers, or causes to be administered, to or taken by any other person any poison or other destructive or noxious thing with intent to injure, aggrieve, or annoy such person;

(*c.*) [3] or who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child ([4] even if the intention so to use the same exists only in his own mind, and is not entertained by the woman whose miscarriage he intends to procure).

(*d.*) [5] or who, being legally liable either as a master or a mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, or unlawfully and

[1] 24 & 25 Vict. c. 100, s. 20.

[2] Ibid. s. 24. An intent to excite sexual passion is within this provision: *R.* v. *Wilkins*, L. & C. 80.

[3] Ibid. s. 59. To supply a thing which is not noxious with the intent mentioned is not within the section: *R.* v. *Isaac*, L. & C. 220.

[4] *R.* v. *Hillman*, L. & C. 343.

[5] Ibid. s. 26.

maliciously does, or causes to be done, any bodily harm to such apprentice or servant, so that the life of such apprentice or servant is endangered, or that his health has been or is likely to be permanently injured;

(*e.*) [1] or, who [2] sets any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith.

Every person is deemed to have set any of the above-mentioned engines who, when it has been set by any other person in any place then in or afterwards coming into the possession or occupation of the person first mentioned, permits it to continue so set with the intent aforesaid.

Provided that this clause does not extend to any gin or trap usually set with the intent of destroying vermin, or to any spring-gun, man-trap, or engine, set from sunset to sunrise in a dwelling-house for the protection thereof.

Article 240.

NEGLIGENT ACTS PUNISHABLE WITH TWO YEARS IMPRISONMENT.

Every one is guilty of a misdemeanor and liable to two years imprisonment with hard labour as a maximum punishment,

(*a.*) [3] who by any unlawful act, wilful omission, or neglect, endangers, or causes to be endangered, the safety of any person conveyed or being in or upon a railway, or aids or assists therein,

(*b.*) [4] or who, having the charge of any carriage or vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person whatever.

[1] 24 & 25 Vict. c. 100, s. 31.
[2] "Sets or places or causes to be set or placed."
[3] 24 & 25 Vict. c. 100, s. 34.
[4] Ibid. s. 35.

CHAPTER XXVII.

ASSAULTS, AGGRAVATED AND COMMON, PUNISHABLE ON INDICTMENT.

ARTICLE 241.

ASSAULT AND BATTERY AND ASSAULT DEFINED.

AN assault is

(*a.*) [1] an attempt unlawfully to apply any the least actual [2] force to the person of another directly or indirectly,

(*b.*) the act of using a gesture towards another giving him reasonable grounds to believe that the person using that gesture meant to apply such actual force to his person as aforesaid,

(*c.*) The act of depriving another of his liberty,

in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud.

A battery is an assault whereby any the least actual force is actually applied to the person of another, or to the dress worn by him, directly or indirectly.

Provided that such acts as are reasonably necessary for the common intercourse of life, are not assaults or batteries if they are done for the purpose of such intercourse only and with no greater force than the occasion requires.

No mere words can in any case amount to an assault.

[1] See Article 42 for a definition of an attempt.

[2] 1 Russ. Cr. (5th Ed.) 956; 1 Hawk. P. C. 100. A most elaborate definition of "force" is given in the Indian Penal Code, s. 350, as the foundation for a definition of assault, s. 351. The definition is almost more mathematical than legal. It begins thus: "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other," &c., &c. It is impossible not to ask why, if force is to be defined, motion should be left undefined. It is, I think, hardly too great a demand on the candour of a reader to suppose that he will see that a man who withdraws a chair on which a person is about to sit down, causing him thereby to fall to the ground; or who whips a horse on which he is sitting, and so makes him run away with his rider; or who breaks a hole in ice in front of a skater, and so causes him to fall into the water—"applies actual force to his person indirectly."

Illustrations.

The following are cases of assault and battery:—

(1.) [1] A cuts B's dress whilst B is wearing it, but without touching or intending to touch any part of B's person.

(2.) [2] A sets a dog at B, which bites B.

(3.) [3] A man professing to act as a medical adviser fraudulently induces a girl to allow him to undress her, by falsely alleging that it is necessary for medical reasons to do so.

(4.) [4] A touches B, a boy of eight, in a grossly indecent manner, B acquiescing in ignorance of the nature of the act.

(5.) [5] A induces B to permit him to have connection with her, by pretending to be her husband.

The following are cases of assault without battery:—

(6.) [6] A strikes at B with a stick without hitting him.

(7.) [7] A aims a pistol at B which A knows is not loaded, but which B believes to be loaded.

In the following cases no assault or battery is committed:—

(8.) A lays his hand on B, to attract his attention.

(9.) A, falling down, catches hold of B to save himself.

(10.) A crowd of people, going into a theatre, push and are pushed against each other.

Article 242.

PUNISHMENT OF ASSAULTS WITH INTENT TO COMMIT SODOMY.

[8] Every one is guilty of a misdemeanor and is liable, upon conviction thereof, to ten years penal servitude as a maximum punishment, who is guilty of any assault with intent to commit sodomy or of any indecent assault upon any male person.

[1] *R.* v. *Day*, 1 Cox, C. C. 207.

[2] 1 Russ. Cr. 958, gives several cases of this sort.

[3] *R.* v. *Rosinski*, 1 Russ. Cr. 959; and see *R.* v. *Case*, 1 Den. 580.

[4] *R.* v. *Lock*, L. R. 2 C. C. R. 10, and see *R.* v. *Barnett*, L. R. 2 C. C. R. 81.

[5] *R.* v. *Williams*, 8 C. & P. 286. The prisoner was sentenced to three years imprisonment with hard labour, no doubt on the ground that the assault was indecent. The maximum punishment would now be two years hard labour. See Article 245 (*d.*).

[6] 1 Hawk. P. C. 110.

[7] *R.* v. *George*, 9 C. & P. 483.

[8] 24 & 25 Vict. c. 100, s. 62. The last words of this enactment would cover the case of an indecent assault by a woman on a man; but this can hardly have been intended.

Article 243.

ASSAULTS ON PERSONS PROTECTING WRECK.

[1] Every one is guilty of a misdemeanor and is liable, upon conviction thereof, to a maximum punishment of seven years penal servitude, who assaults and strikes or wounds any magistrate, officer, or other person lawfully authorized, in or on account of the execution of his duty in or concerning the preservation of any vessel in distress, or of any vessel or goods or effects wrecked, stranded, or cast on shore, or lying under water.

Article 244.

ASSAULTS CAUSING ACTUAL BODILY HARM.

[2] Every one commits a misdemeanor and is liable upon conviction thereof, to a maximum punishment of five years penal servitude, who commits an assault occasioning actual bodily harm.

Article 245.

ASSAULTS PUNISHABLE WITH TWO YEARS IMPRISONMENT.

Every person commits a misdemeanor and is liable, upon conviction, to a maximum punishment of two years imprisonment and hard labour,

(*a.*) [3] who assaults any person with intent to commit a felony or to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence;

(*b.*) [3] or who assaults, resists, or wilfully obstructs any peace officer in the due execution of his duty, or any person acting in aid of such officer;

(*c.*) [4] or who assaults any person in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or respecting any trade, business, or manufacture, or respecting any person concerned or employed therein;

[1] 24 & 25 Vict. c. 100, s. 37.
[2] Ibid. s. 47.
[3] Ibid. s. 38.
[4] Ibid. s. 41.

(*d.*) [1] or who indecently assaults any female, or attempts to have carnal knowledge of any girl under twelve years of age;

(*e.*) [2] or who by threats or force obstructs, or prevents, or endeavours to obstruct or prevent any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place;

(*f.*) [3] or who strikes or offers any violence, or arrests upon or under the pretence of executing any civil process any clergyman or other minister engaged in or to the knowledge of the offender about to engage in any of the rites or duties mentioned in the last clause, or to the knowledge of the offender going to perform the same, or returning from the performance thereof.

Article 246.

PUNISHMENT OF COMMON ASSAULT ON INDICTMENT.

[4] Every person who commits a common assault is guilty of a misdemeanor and is liable, on conviction thereof, to a maximum punishment of one year's imprisonment and hard labour.

The punishments specified in this chapter can be inflicted only in cases in which the offender is convicted on an indictment or information.

Article 247.

ASSAULTS ON OFFICERS PREVENTING SMUGGLING.

[5] Every person is guilty of a misdemeanor and is liable to a fine of one hundred pounds who assaults, resists, or obstructs

[1] 24 & 25 Vict. c. 100, s. 52.

[2] Ibid. s. 36.

[3] Ibid. s. 36.

[4] Ibid. s. 47.

[5] 39 & 40 Vict. c. 36, s. 187. This offence appears to be punishable only on indictment or information. See s. 255.

any officer of the army, navy, marines, coastguard, customs, or other person duly employed for the prevention of smuggling, in the execution of his duty, or in the seizing of any goods liable to forfeiture under the Customs Acts, or aids, abets, or assists therein.

CHAPTER XXVIII.

PUNISHMENT OF ASSAULTS ON SUMMARY CONVICTION.

ARTICLE 248.

ASSAULTS PUNISHABLE ON SUMMARY CONVICTION.

EVERY person who commits an assault may, subject to the provisions in this chapter contained, be punished in respect thereof upon summary conviction before two justices of the peace.

ARTICLE 249.

ASSAULTS WHICH OUGHT NOT TO BE PUNISHED ON SUMMARY CONVICTION.

[1] In case the justices find the assault or battery complained of to have been accompanied by any attempt to commit felony, or are of opinion that the case is from any other circumstance a fit subject for a prosecution by indictment, they must abstain from any adjudication thereupon and deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same.

Justices have no power under the provisions of this chapter to hear and determine any case of assault or battery in which any question arises as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any Court of justice.

ARTICLE 250.

AGGRAVATED ASSAULTS.

[2] If the assault or battery is, in the opinion of the justices, of an aggravated nature, and if the person assaulted is a

[1] 24 & 25 Vict. c. 100, s. 46.

[2] Ibid. s. 43.

female, or a male whose age does not in the opinion of the justices exceed fourteen years,[1] or if the person assaulted is a constable in the execution of his duty, the offender may be fined any sum not exceeding £20,[2] together with costs, and in default of payment may be imprisoned with or without hard labour for a maximum period of six months, unless such fine is sooner paid; or he may be imprisoned without the option of a fine, and[2] he may in any case be bound to keep the peace and be of good behaviour for six months from the expiration of his sentence if the justices think fit.

In the case of an assault on a constable in the execution of his duty the offender may, if he has been convicted of a similar assault within two years, be imprisoned with or without hard labour for a maximum term of nine months.

Article 251.

ASSAULTS PUNISHABLE WITH THREE MONTHS IMPRISONMENT.

Every one is liable to a maximum punishment of three months hard labour

(*a.*)[3] who beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling, or otherwise disposing of, or to compel him to buy, sell, or otherwise dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or beats or uses any such violence or threat to any person having the care or charge of any such thing whilst on the way to or from any city, market town, or other place, with intent to stop the conveyance of the same;

(*b.*)[4] or who unlawfully and with force hinders or prevents any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or beats or uses any violence to any such person with intent to hinder or prevent him from working at the same.

Provided that no person punished under this article can be

[1] 34 & 35 Vict. c. 112, s. 12.

[2] These words do not apply to the case of an assault on a constable.

[3] 24 & 25 Vict. c. 100, s. 39.

[4] Ibid. s. 40.

punished for the same offence by virtue of any other law whatsoever.

Article 252.

PUNISHMENT OF COMMON ASSAULTS ON SUMMARY CONVICTION.

[1] Where any person unlawfully assaults or beats any other person, and is convicted thereof upon complaint by or on behalf of the party aggrieved, he is liable to the following consequences:

To be imprisoned with or without hard labour for a maximum term of two months;

or else to be fined any sum not exceeding, together with costs, if ordered, £5, and if such sum is not paid within such term as the convicting justices appoint at the time of the conviction, to be imprisoned, with or without hard labour, for a maximum term of two months.

Article 253.

CERTIFICATE OF CONVICTION OR ACQUITTAL.

[2] When a complaint of assault or battery preferred by or on behalf of the party aggrieved under Articles 250 or 252 has been heard upon the merits before justices and they deem the offence not to be proved, or find the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the complaint, or when the punishment awarded by them has been endured, the defendant is released from all further proceedings for such assault or battery.

[1] 24 & 25 Vict. c. 100, s. 42.

[2] Ibid. ss. 44, 45. The words in the Act are "for the same cause." In *R.* v. *Morris*, L. R. 1 C. C. R. 90 (followed in *Masper* v. *Brown*, L. R. 1 C. P. D. 97), it was held that these words mean subsequent proceedings for an assault, and that they do not mean to cover subsequent proceedings for the act constituting the assault. It was held in *R.* v. *Morris* that if death followed an assault, for which the offender had been punished, he might nevertheless be indicted for manslaughter. In *Masper* v. *Brown* it was held that a man who had been fined for an assault on a married woman could not be afterwards sued by her husband for the damage he had sustained by the loss of his wife's services.

[1] Upon the dismissal of any such complaint the justices must forthwith make out a certificate of the fact of such dismissal and give it to the party against whom the complaint was dismissed.

[1] 24 & 25 Vict. c. 100, s. 44.

CHAPTER XXIX.

RAPE, ETC.

ARTICLE 254.

DEFINITION OF RAPE.

[1] RAPE is the act of having carnal knowledge of a woman without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm; but if such permission is given, the fact that it was obtained by

[1] See the cases in the Illustrations, and see 1 Russ. Cr. 858, &c. A late decision, *R.* v. *Flattery* (46 L. J. (M.C.) 130), has thrown much uncertainty over the law. The prisoner was convicted of rape for having procured connection with a girl by falsely pretending that the act was necessary for a surgical or medical purpose, "the prosecutrix making but feeble resistance, believing that the prisoner was treating her medically." Two of the judges laid stress upon the resistance as negativing consent to sexual connection, though not to the act done or supposed to be done. The Court, however, almost, though not altogether, overruled the principle said in *R.* v. *Barrow* (L. R. 1 C. C. R. 158), to be "established by a class of cases" (*R.* v. *Jackson*, R. & R. 487; *R.* v. *Clarke*, Dear. 397; *R.* v. *Saunders*, 8 C. & P. 265; *R.* v. *Williams*, 8 C. & P. 286) "that where consent is obtained by fraud the act done does not amount to rape." Hardly any of these cases seem to have been cited in the argument, though *R.* v. *Barrow* was. In *R.* v. *Flattery*, as in *R.* v. *N. Fletcher*, the Statute of Westminster 2d., 13 Edw. 1, c. 34, was referred to as giving a "definition of rape." I do not see how the statute can be treated as defining rape at all. The words are "purveu est que si homme ravist femme, espouse, damoisele, ou autre femme desoremes, par la ou ele ne se est assentue, ne avaunt ne apres eit judgement, &c., e ensement par la ou home ravist femme, &c., a force tut seit ke ele se assente apres." In the Latin version the words are "rapiat ubi nec ante nec post consenserit." This cannot be a definition of rape, because it contains the word "rape." If however it is taken as being a definition, it implies that there may be cases of rape in which the woman consents, for the punishment is confined to cases of rape where there is no consent, before or after. The latter part of the enactment which speaks of consent after the fact appears inapplicable to rape in the modern sense of the word. When the crime is over how can a person consent to it? Had it not been for Coke's comments (2d Inst. 180, 433, 3d Inst. 60), I should have thought that the words applied rather to abduction than to what we mean by rape, especially as the statute contains provisions as to the ravishment of wards, in which the word "rapuit" is used, but I cannot think that the legislature intended to lay down any definition at all. Their language implies that the crime was then well known, and so does Coke's comment. The Act was repealed by 9 Geo. 4, c. 31, s. 1.

fraud, or that the woman did not understand the nature of the act, is immaterial. Provided that:—

(1.) [1] A husband [it is said] cannot commit rape upon his wife by carnally knowing her himself, but he may do so if he aids another person to have carnal knowledge of her.

(2.) [2] A boy under fourteen years of age is conclusively presumed to be incapable of committing rape.

[3] Carnal knowledge means the penetration to any the slightest degree of the organ known by the male organ of generation.

Illustrations.

(1.) [4] A has connection with B, a woman who at the time of the connection is in a state of insensibility. A has ravished B.

(2.) [5] A has connection with B, an idiot, who by reason of her idiotcy submits, but does not permit the act. A has ravished B.[4]

(3.) [6] A has connection with B, an idiot, who permits the act from mere sexual instinct, but without understanding its nature. A has not ravished B.

(4.) [7] A has connection with B, a married woman, who permits the act because, owing to A's fraud, she believes him to be her husband. A has not ravished B.

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[1] 1 Hale, P. C. 629. Hale's reason is that the wife's consent at marriage is irrevocable. Surely, however, the consent is confined to the decent and proper use of marital rights. If a man used violence to his wife under circumstances in which decency or her own health or safety required or justified her in refusing her consent, I think he might be convicted of rape, notwithstanding Lord Hale's dictum. He gives no authority for it, but makes the remark only by way of introduction to the qualification contained in the latter part of clause (1), for which *Lord Castlehaven's Case* (3 St. Tr. 402) is an authority.

[2] 1 Hale, P. C. 630. See *R.* v. *Groombridge*, 7 C. & P. 583. The presumption extends to cases of assault with intent to ravish. See *R.* v. *Phillips*, 8 C. & P. 736. The occasional incorrectness of this presumption is shown by *R.* v. *Read*, 1 Den. 377.

[3] 24 & 25 Vict. c. 100. s. 63, and see *R.* v. *Cox*, Ry. & Mood. 337, and *R.* v. *Allen*, 9 C. & P. 31, decided on the earlier enactment, 9 Geo. 4, c. 31, s. 111.

[4] *R.* v. *Camplin*, 1 Den. C. C. 89.

[5] *R.* v. *N. Fletcher*, Bell, C. C. 63; referring to the definition given in Westm. 2, c. 34.

[6] *R.* v. *C. Fletcher*, L. R. 1 C. C. R. 39. In *R.* v. *Barratt* (L. R. 2 C. C. R. 81), in which the facts are similar to those in the case of *N. Fletcher*, the judges said that there was no inconsistency between the cases of *N. Fletcher* and *C. Fletcher*.

[7] *R.* v. *Barratt*, L. R. 2 C. C. R. 157; *R.* v. *Clarke*, Dear. 397; *R.* v. *Jackson*, R. & R. 487. He has, however, committed an indecent assault, *R.* v. *Williams*, 8 C. & P. 286; *R.* v. *Barrow*, L. R. 1 C. C. R. 156.

Article 255.

PUNISHMENT OF RAPE AND CARNALLY KNOWING CHILDREN UNDER TWELVE.

[1] Every one is guilty of felony and liable to penal servitude for life as a maximum punishment, who

(*a.*) commits rape, or

(*b.*) [2] unlawfully and carnally knows and abuses any girl under the age of twelve years.

Article 256.

CARNALLY KNOWING CHILDREN BETWEEN TWELVE AND THIRTEEN.

[3] Every one commits a misdemeanour, and is liable upon conviction thereof to a maximum punishment of two years imprisonment and hard labour, who unlawfully and carnally knows and abuses any girl above the age of twelve and under the age of thirteen years, whether [4] with or without her consent.

[1] 24 & 25 Vict. c. 100, s. 48.

[2] 38 & 39 Vict. c. 94, s. 3.

[3] Ibid. s. 4.

[4] 38 & 39 Vict. c. 94, s. 3. These words are obviously a mistake. In the preceding section (where they do not appear) they would have been superfluous, but harmless. In this section they are mischievous, for, if taken literally, they make it impossible to commit a rape upon a girl between twelve and thirteen, as they provide that carnally to know a girl between twelve and thirteen *without her consent* is a misdemeanor. The words ought either to be omitted altogether or else changed into "even with her consent." Probably the Court would so construe them, for it is impossible to suppose that Parliament can have intended the monstrous consequence pointed out above.

CHAPTER XXX.

CRIMES AFFECTING CONJUGAL AND PARENTAL RIGHTS—BIGAMY—ABDUCTION.

ARTICLE 257.

DEFINITION AND PUNISHMENT OF BIGAMY.

[1] EVERY one commits the felony called bigamy, and is liable, upon conviction thereof, to a maximum punishment of seven years penal servitude, who, being married, marries any other person during the life of his or her wife or husband.

[2] The expression "being married" means being legally married. The word "marries" means goes through a form of marriage which the [3] law of the place where such form is used recognizes as [4] binding, whether the parties are by that law competent to contract marriage or not, and although by their fraud the form employed may, apart from the [5] bigamy, have been insufficient to constitute a binding marriage.

Provided that this article does not extend

(i.) [6] to a second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty; nor

(ii.) to any person marrying a second time, whose husband or wife has been continually absent from such person for seven years then last past, and has not been known by such person to be living within that time.

[7] The burden of proving such knowledge is upon the pro-

[1] 24 & 25 Vict. c. 100, s. 57, as explained by the authorities referred to in the Illustrations. See note to Article 34, *ante*.

[2] See Illustration (2).

[3] *Burt* v. *Burt*, 29 L. J. (Probate) 133.

[4] See Illustration (3).

[5] See Illustration (4).

[6] The Act does extend to a subject of Her Majesty who has contracted a second marriage in Scotland during the lifetime of a wife previously married in Scotland: *R.* v. *Topping*, Dear. 647. The same rule would, of course, apply to a bigamous marriage in any foreign country.

[7] *R.* v. *Curgenven*, L. R. 1 C. C. R. 1.

secutor when the fact that the parties have been continually absent for seven years has been proved; nor

(iii.) to any person who at the time of such second marriage was divorced from the bond of the first marriage, nor to any person whose first marriage has been declared void by the sentence of any Court of competent jurisdiction.

[1] A divorce *à vinculo matrimonii* pronounced by a foreign Court between persons who have contracted marriage in England, and who continue to be domiciled in England, on grounds which would not justify such a divorce in England, is not a divorce within the meaning of this clause.

Illustrations.

(1.) [2] A marries B, a person within the prohibited degrees of affinity, and during B's lifetime marries C. A has not committed bigamy.

(2.) [3] A marries B, and during B's lifetime goes through a form of marriage with C, a person within the prohibited degrees of affinity. A has committed bigamy.

(3.) [4] A marries B in Ireland, and during B's lifetime goes through a form of marriage with C in Ireland which is invalid, because both A and B are Protestants, and the marriage is performed by a Roman Catholic priest. A commits bigamy.

(4) [5] A, married to C, marries B in C's lifetime by banns. B (the woman) being married, for purposes of concealment, under a false name. A has committed bigamy.

(5.) [6] A, married to B, marries C in B's lifetime, in the colony of Victoria. In order to shew that A committed bigamy it must be proved that the

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[1] *R* v. *Lolley*, R. & R. 237. The decision does not refer to domicil, but this qualification appears from later cases to be required. All the cases on this subject are collected in 2 Sm. L. C. 839–45. The question as to the exact time at which a person can be said to be divorced may arise. In 1 Hale, P. C. 694, a case is mentioned in which a person marrying after sentence of divorce, but pending an appeal, was held to be within a similar proviso in 1 Ja. c. 11. In *R.* v. *Hale*, tried at the Leeds summer assizes, 1875, a woman pleaded guilty to a charge of bigamy before Lindley, J., she having married after the decree nisi was pronounced, but before it became absolute, which it afterwards did. The judge's attention, however, was not directed to the passage in Hale.

[2] *R.* v. *Chadwick*, 11 Q. B. 205.

[3] *R.* v. *Brawn*, 1 C. & K. 144; *R.* v. *Allen*, L. R. 1 C. C. R. 367.

[4] *R.* v. *Allen*, *ub. sup.* pp. 373–5, disapproving of *R.* v. *Fanning*, 17 Ir. C. L. 289.

[5] *R.* v. *Parson*, 5 C. & P. 412. In *R* v. *Rea*, the prisoner at the bigamous marriage (before the registrar) gave a false Christian name, and was held to be rightly convicted.

[6] *Burt* v. *Burt*, 29 L. J. (Probate) 133.

form by which he was married was one recognised as a regular form of marriage by the law in force in Victoria.

Article 258.

PRINCIPALS IN SECOND DEGREE IN BIGAMY.

[1] Every one is a principal in the second degree in the crime of bigamy who, being unmarried, knowingly enters into a marriage which renders the other party thereto guilty of bigamy.

Article 259.

IRREGULAR MARRIAGES UNDER THE MARRIAGE ACT OF 1823.

[2] Every one is guilty of felony, and is liable upon conviction thereof to a maximum punishment of fourteen years' penal servitude, who knowingly and wilfully

(*a.*) solemnises matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special licence from the Archbishop of Canterbury; or

(*b.*) solemnises matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person having authority to grant the same; or

(*c.*) falsely pretending to be in holy orders, solemnises matrimony according to the rites of the Church of England.

[3] Provided that nothing in this article contained applies to the solemnisation of marriage under the provisions of any Act of Parliament passed after the 18th of July, 1823.

[1] *R.* v. *Brawn & Webb*, 1 C. & K. 144.

[2] 4 Geo. 4, c. 76, s. 21.

[3] This proviso is added to express the effect of subsequent legislation on the subject. The acts referred to are 6 Geo. 4, c. 92; 11 Geo. 4 & 1 Will. 4, c. 18; 6 & 7 Will. 4, c. 85; 7 Will. 4 & 1 Vict. c. 22, and some others. The Act of 1823 assumes that all marriages are solemnised in the Established Church. The Act of 1837, 6 & 7 Will. 4, c. 85, provides for the solemnisation of marriages elsewhere.

Article 260.

IRREGULAR MARRIAGES UNDER THE MARRIAGE ACT OF 1837.

[1] Every one is guilty of felony who knowingly and wilfully

(*a.*) solemnises any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in a [2] notice and certificate issued under the 6 & 7 Wm. 4, c. 85 ([3] except in the case of a marriage between two of the Society of Friends, commonly called Quakers, or between two persons professing the Jewish religion, according to the usages of the Jews); or

(*b.*) who, in any such registered building or office, solemnises any marriage in the absence of a registrar of the district in which such registered building or office is situated; or

(*c.*) who solemnises any marriage in England (except by licence) within twenty-one days after the entry of the notice to the superintendent registrar, or after three months after such entry.

Article 261.

ABDUCTION WITH INTENT TO MARRY.

Every one commits felony and is liable, upon conviction, to a maximum punishment of fourteen years penal servitude, who, with intent to marry or carnally know any woman, or with intent to cause any woman to be married or carnally known by any other person,

(*a.*) [4] from motives of lucre, takes away or detains against

[1] 6 & 7 Will. 4, c. 85, s. 39.

[2] Sect. 7, relating to the certificate, is repealed, 37 & 38 Vict. c. 35.

[3] No such exception is contained in the Act of 1823; but it can hardly have been intended to apply to such marriages. See 10 & 11 Vict. c. 58 (passed in consequence of the decision in *R.* v. *Millis*, 10 C. & F. 534).

[4] 24 & 25 Vict. c. 100, s. 53 (redrawn). The meaning of the words "possession" and "fraudulently" was considerably discussed in *R.* v. *Burrell*, L. & C. 354; but as the Court differed on the facts of the case, no definite conclusion was arrived at.

her will any such woman having any such interest in property as is hereinafter mentioned; or

(*b.*) [1] fraudulently allures, takes away, or detains, any such woman, being under the age of twenty-one years, and having any such interest in property as is hereinafter mentioned, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; or

(*c.*) [2] by force takes away or detains against her will any woman of any age.

If any woman, against whom either of the offences defined in clauses (*a*) and (*b*) is committed, has any interest, legal or equitable, present or future, absolute, conditional, or contingent in any real or personal estate, or is a presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin to any one having such interest, any person convicted of either of the said offences against her is incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress, or next of kin, and if any such marriage has taken place, such property must, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland may, upon any information at the suit of the Attorney General appoint.

[3] In prosecutions for offences against this article, a woman who, having been taken away, has been married to the offender, is, notwithstanding that marriage, competent to be a witness against him.

Article 262.

Abduction of girls under sixteen.

[4] Every one commits a misdemeanor and is liable to a maximum punishment of two years imprisonment and hard

[1] See *ante*, Note [4], p. 177.

[2] 24 & 25 Vict. c. 100, s. 54.

[3] *R.* v. *Wakefield*, 1 Lew. 279; *R.* v. *Perry*, 1 R. C. & M. 949.

[4] 24 & 25 Vict. c. 100, s. 55, as explained by the cases referred to in the Illustrations.

labour, who unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

The taking must be a taking under the power, charge, or protection of the taker, but it is immaterial whether the girl is taken with her own consent, or at her own suggestion, or against her will.

The expression "taking out of the possession" means taking the girl to some place where the person in whose charge she is cannot exercise control over her, for some purpose inconsistent with the objects of such control. A taking for a time only may amount to abduction.

If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such person.

The fact that the offender supposes, in good faith and on reasonable grounds, that the girl is more than sixteen years of age, is immaterial; but [it seems] it is necessary that he should either know, or have reason to believe, that she was under the lawful care or charge of her father, mother, or some other person.

Illustrations.

(1.) [1]A and B, two girls under sixteen, run away from home together. Neither abducts the other.

(2.) [2]A persuades B, a girl under sixteen, to leave her father's house, and sleep with him for three nights, and then sends her back. A has abducted B.

(3.) [3]A, a lady, persuades B, a girl under sixteen, to leave her father's house, and come to A's house for a short time, for the purpose of going to the play with her. A has not abducted B.

(4.) [4]A, a girl under sixteen, asks B, by whom she had been seduced, to elope with her, which he does. B commits abduction.

(5) [5]A induces B to permit his daughter C to go away by falsely pretending that he (A) will find a place for C. A abducts C.

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[1] *R.* v. *Meadows*, 1 Car. & Kir. 399, as explained by note to *R.* v. *Kipps*, 4 Cox, C. C. 168; and *R.* v. *Manktelow*, Dears. C. C. 162.

[2] *R.* v. *Timmins*, Bell, 276.

[3] Founded on a dictum of Crompton, J., in *R.* v. *Timmins*.

[4] *R.* v. *Biswell*, 2 Cox, C. C. 259; and see *R.* v. *Robins*, 1 C. & K. 456.

[5] *R.* v. *Hopkins*, Car. & Mar. 254.

(6.) [1]A takes B, a girl under sixteen, out of her father's possession, believing her upon good grounds to be eighteen. A has abducted B.

(7.) [2]A meets B, a girl under sixteen, in the street, gets her to stay with him some hours, during which interval he seduces her, takes her back to the place where he found her, and there leaves her. She returns home. A was not aware at the time that B had a father or mother living. A has not abducted B.

Article 263.

STEALING CHILDREN UNDER FOURTEEN.

[3]Every one is guilty of felony and is liable, upon conviction, to a maximum punishment of seven years penal servitude, who

(1.) unlawfully, either by force or fraud, leads, or takes away, or decoys or entices away, or detains any child under the age of fourteen years; or

(2.) receives or harbours any such child, knowing it to have been so dealt with,

with intent to deprive any parent or guardian, or other person having the lawful care or charge of such child, of the possession of it, or with intent to steal any article about or upon the person of such child.

Provided that this article does not extend to any person who gets possession of any child, or takes any child out of the possession of any one who has lawful charge of it, if such person either claims a right to the possession of the child, or (if it is an illegitimate child) is its mother or claims to be its father.

[1] *R.* v. *Prince*, L. R. 2 C. C. R. 154.
[2] *R.* v. *Hibbert*, L. R. 1 C. C. R. 144.
[3] 34 & 35 Vict. c. 112, s. 56, W.

CHAPTER XXXI.

OFFENCES AGAINST CHILDREN BY PARENTS AND OTHERS.

ARTICLE 264.

NEGLECTING TO PROVIDE FOOD, &C., FOR CHILDREN.

[1] Every one commits a misdemeanour who, being the parent, or master, or mistress, of any child of tender years, and unable to provide for itself, refuses or neglects (being able to do so) to provide sufficient food, clothes, bedding, and other [2] necessaries for such child, so as thereby to injure the health of such child.

ARTICLE 265.

PARENTS NOT PROVIDING NECESSARIES FOR CHILDREN.

[3] Every one commits a misdemeanour, and is liable upon summary conviction thereof before two justices to a maximum punishment of six months imprisonment with hard labour, who, being a parent, wilfully neglects to provide adequate food, clothing, medical aid, or lodging, for his child, being in his custody, under the age of fourteen years, whereby the health of such child is, or is likely to be, seriously injured.

The justices may suspend the sentence until further notice if the offender enters into his own recognisances, with or without one or more sureties, as the justices may think fit, to come up for judgment when called upon.

[1] *Friend's Case*, R. & R. 20; *R.* v. *Ryland*, L. R. 1 C. C. R. 99. It is necessary to prove actual injury to the child's health, *R.* v. *Phillpott*, Dear. 179, and *R.* v. *Hogan*, 2 Den. 277, and that the defendant actually has, not merely that he might get from the relieving officer, the means of providing for the child; *R.* v. *Chandler*, Dear. 453.

[2] It is doubtful whether this includes medical attendance as regards any one but a parent who is under a statutory obligation to provide it. See Article 266: *R.* v. *Downes*, 1 Q. B. D. (C. C. R.) 25.

[3] 31 & 32 Vict. c. 122, s. 37.

The guardians of the union or parish in which the child may be living [1] must institute the prosecution, and pay the costs thereof out of their funds.

Article 266.

MASTERS NOT PROVIDING FOR APPRENTICES—ABANDONING CHILDREN UNDER TWO.

Every one commits a misdemeanour, and is liable upon conviction thereof to a maximum punishment of five years penal servitude.

(*a.*) [2] who, being legally liable either as a master or a mistress to provide for any apprentice or servant necessary food, clothing, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, or unlawfully and maliciously does, or causes to be done, any bodily harm to such apprentice or servant, so that the life of such apprentice or servant is endangered, or that his health has been or is likely to be permanently injured;

(*b.*) [3] or who unlawfully abandons or exposes any child being under the age of two years, whereby the life of such child is endangered or its health has been or is likely to be permanently injured.

The words "abandon" and "expose," include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of dealing with it calculated to leave it exposed to risk without protection.

Illustrations.

(1.) [4] B, A's wife, living apart from A, leaves C their child, nine months old, lying in the road outside A's door. A, knowing its position, lets it lie there from 7 P.M till 1 A.M. A's mother, D, knowing the child is there, and being in her house, acts in the same way as A. A has abandoned and exposed C, but D has not, as she was under no legal obligation to take charge of C.

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[1] "Shall." Does this mean that no one else may do so?

[2] 24 & 25 Vict. c. 100, s. 26.

[3] Ibid. s. 27.

[4] *R.* v. *White*, L. R. 2 C. C. R. 311.

(2.) [1] A sends B, her child five weeks of age, packed up in a hamper as a parcel, by railway to C, B's putative father, giving directions to the clerk to be very careful of the hamper, and send it by the next train. The child reaches C safely. A has abandoned and exposed B.

[1] *R.* v. *Falkingham*, L. R. 2 C. C. R. 222.

CHAPTER XXXII.

* LIBELS ON PRIVATE PERSONS.

ARTICLE 267.

DEFINITION OF LIBEL.

THE word "libel" means

(*a.*) the offence defined in this Article.

(*b.*) Anything by the publication of which the offence is committed.

[1]Every one commits the misdemeanor called libel who maliciously publishes defamatory matter of any person, or body of persons, definite and small enough for its individual members to be recognised as such, in or by means of anything capable of being a libel in the second sense of the word.

The publication of a libel on the character of a dead person is not a misdemeanor unless it is calculated to throw discredit on living persons.

Illustrations.

(1.) [2]A religious society called the S. Nunnery, consisting of certain nuns and other persons, may be libelled though no individual is specially referred to.

(2.) [3]A libel may be published against "certain persons lately arrived from Portugal and living near Broad Street," though no particular person is mentioned or referred to.

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* See Note XVI.

[1] 1 Hawk. P. C. 542. As to what can be a "libel" see Article 268. As to "publishes," see Article 270; "maliciously," see Article 271. As to libels on the dead see *R.* v. *Topham*, 4 T. R. 126. Lord Kenyon's words are, "If it be done with a malevolent purpose to vilify the memory of the deceased with a view to injure his posterity, then it is done with a design to break the peace." As the design to break the peace is only a legal fiction, and as men intend the natural consequences of their acts, this is equivalent to what is stated in the text.

[2] *R.* v. *Gathercole*, 2 Lew. 237.

[3] *R.* v. *Osborne*, 2 Keb. 230.

Article 268.

THINGS CAPABLE OF BEING LIBELS.

[1] Any words or signs conveying defamatory matter marked upon any substance, and any thing which by its own nature conveys defamatory matter, may be a libel in the second sense of the word before mentioned. Words spoken can in no case be a libel, although they may convey defamatory matter.

Illustration.

A letter or passage in a book or newspaper, words written on a wall, a picture, a gallows set up before a man's door, may be a libel.

Article 269.

DEFAMATORY MATTER.

[2] Defamatory matter is matter which, either directly or by insinuation or irony, tends to expose any person to hatred, contempt, or ridicule.

Illustrations.

The following are instances of defamatory matter:—

[3] A question suggesting that illegitimate children were born and murdered in a nunnery;

[4] "A adds to his other vices ingratitude";

[5] "A will not play the fool or the hypocrite" (meaning that he would);

[6] "A has the itch, and smells of brimstone;"

[7] An imputation that A (a clergyman) poisoned foxes in a hunting country and hung them by the neck, and was himself hung in effigy for so doing.

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[1] 3 Russ. Cr. (5th ed.) p. 178; 1 Hawk. P. C. 452; Folkard's Starkie, 151. As to cases in which words spoken amount to a criminal offence, see Articles 67, 91, 161.

[2] Folkard's Starkie, 156, 157.

[3] *R.* v. *Gathercole*, 2 Lew. C. C. 255.

[4] *Cox* v. *Lee*, L. R. 4 Ex. 284.

[5] 1 Hawk. P. C. 543.

[6] *Villars* v. *Moristen*, Holt, 216.

[7] *R.* v. *Cooper*, 8 Q. B. 533. I think it might, under special circumstances, be a libel to say of a person a thing apparently quite inoffensive. Suppose, for instance, a man wrote of another "his name is A," meaning that his real name was A, and that the name of B, by which he passed, was falsely assumed, would not this be a libel?

Article 270.

PUBLICATION DEFINED.

[1] To publish a libel is to deliver it, read it, or communicate its purport in any other manner, or to exhibit it to any person other than the person libelled, provided that the person making the publication knows, or has an opportunity of knowing, the contents of the libel [(SUBMITTED) if it is expressed in words, or its meaning if it is expressed otherwise].

[2] A libel published in the ordinary course of the business of any person whose trade it is to deal in articles of the kind to which the libel belongs, is deemed to be published, not only by the person who actually sells or exhibits it, but also by his master if his master has given him general authority to sell or exhibit for his master's profit articles of that kind.

[3] Provided that whenever, upon the trial of any person for the publication of a libel, evidence has been given which establishes a presumptive case of publication against the defendant by the act of any other person by his authority, the defendant may prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

Illustrations.

(1.) [4] A delivers to B an open letter, of which A is the author, containing matter defamatory of C. A has published a libel.

(2.) [4] A posts to B a sealed letter, of which A is the author, and which contains a libel on C. It seems that the posting of the letter is in itself a publication (*quære*).

(3.) [4] The postman delivers to B the letter mentioned in the last illustration. The postman has not published the letter, but A has.

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[1] *R.* v. *Burdett*, 4 B. & Ald. 95.

[2] Cases in Folkard's Starkie, 427–8; and especially *R.* v. *Almon*, 5 Burr. 2686.

[3] 6 & 7 Vict. c. 96, s. 7. Probably the effect of such proof would be to excuse the master, though the Act does not say so. See *R.* v. *Almon* as to the rule before the statute.

[4] All these Illustrations are founded on *R.* v. *Burdett*, 4 B. & Ald. 95. (1) is assumed by all the judges; (2) is doubted by Bailey, J., p. 153; (3) is given by Best, J., p. 126.

(4.) A bookseller's shopman sells a libellous book over the counter in the ordinary course of business; both the shopman and the bookseller have published the libel.

Article 271.

When a libel is malicious.

[1] The publication of a libel is malicious in every case which does not fall within the provisions of some one or more of the six articles next following.

Article 272.

Publication of the truth.

[2] The publication of a libel is not a misdemeanor if the defamatory matter is true, and if the publisher can shew that it was for the public benefit that such matter should be published.

Illustration.

[3] A writes of B, "Many years ago B committed immoral acts." The imputation is true. This is not a libel if the publisher can shew that it was for the public benefit that it should be published.

Article 273.

Publication of matter honestly believed to be true.

[4] The publication of a libel is not a misdemeanor if the defamatory matter published is honestly believed to be true,

[1] In *Bromage* v. *Prosser*, 4 B. & C. 247, which is a leading case on the subject, Bayley, J., says, "Malice . . . in its legal sense means a wrongful act done intentionally and without just cause or excuse." From the nature of the case the publication of a libel must be an intentional act. The next six articles sum up the different states of fact which have been held to constitute "just cause or excuse" for publishing libels. In *Bromage* v. *Prosser* and many other cases, much is said of malice in law and malice in fact, of privileged publications, &c., &c.; but a sufficiently simple and intelligible result has at last been reached by very circuitous roads. See Note XVI.

[2] Effect of 6 & 7 Vict. c. 96, s. 6.

[3] *R.* v. *Newman*, 1 E. & B. 553; and see Dear. 85.

[4] See Folkard's Starkie, ch. xii. 249–291. I have gone carefully through these forty-two pages twice or more, and I cannot see that they contain anything beyond this principle and rather obvious illustrations of it expressed in a very complicated way. The leading case on the subject is *Harrison* v. *Bush*, 5 E. & B. 344–348.

by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, provided that the publication does not exceed either in extent or in manner what is reasonably sufficient for the occasion.

When the existence of the relation establishing the duty has been proved, the burden of proving that the statement was not honestly believed to be true is upon the prosecutor.

Illustrations.

(1.) [1]A being asked the character of B, who had been in his service, by C, who is about to engage B as a servant, writes of B in a letter to C, the words "B is a drunkard and a thief." If A honestly and on reasonable grounds believes that B is a drunkard and a thief, though in fact he is neither, this is not a libel.

If A published this letter in a newspaper it would be a libel.

As soon as the circumstances under which the letter was written are proved or appear the burden of proving that A did not honestly and on reasonable grounds believe B to be a drunkard and a thief is upon B in a prosecution or action by B.

(2.) [2]A, the private secretary of a general, being directed by the general to give an inspecting officer information as to the discipline of a body of troops, writes a letter to the inspector, in which he says that B, who had formerly commanded the troops, attempted to excite a mutiny when he was removed from his command. This is not a libel, though false, if A honestly believed it to be true, and if it was relevant to the subject on which A was directed to report.

(3.) [3]A writes a letter containing matter defamatory of B to C, A's mother-in-law, who is about to marry B. If A in good faith believes the imputations to be true, this is not a libel although the imputations are false.

(4.) [4]The mate of a ship writes a letter to A accusing the captain, B, of drunkenness and misconduct. A (who has nothing with the matter)

[1] Many cases as to giving characters to servants are collected and abstracted in Folkard's edition of Starkie, pp. 250–7.

[2] *Beatson* v. *Skene*, 5 H. & N. 838. This was an action for verbal slander, but the principle is the same.

[3] *Todd* v. *Hawkins*, 8 C. & P. 88.

[4] *Coxhead* v. *Richards*, 2 C. B. 569. The judges in this case were equally divided, Tindal, C.J., and Erle, J., thought the letter was not a libel. Coltman and Cresswell, J., thought it was.

forwards the letter to the owner of the ship believing the accusation to be true and thinking himself morally bound to report it. The accusation was in fact false. It is uncertain whether A has or has not libelled B.

Article 274.

FAIR CRITICISM.

[1] The publication of a libel is not a misdemeanor if the defamatory matter consists of comments upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided that such comments are fair.

[2] A fair comment is a comment which is either true, or, which, if false, expresses the real opinion of its author (as to the existence of matter of fact or otherwise), such opinion having been formed with a reasonable degree of care and on reasonable grounds.

[3] Every person who takes a public part in public affairs submits his conduct therein to criticism.

[4] Every person who publishes any book or other literary production, or any work of art, or any advertisement of goods, submits that book, or literary production, or work of art, or advertisement to public criticism.

[5] Every person who takes part in any dramatic performance or other public entertainment, submits himself to public criticism to the extent to which he takes part in it.

Illustrations.

(1.) [6] A, by direction of the Lords of the Admiralty, publishes to the world at large an official report made to the Lords of the Admiralty by B, which report contains matter defaming the character of C as a naval architect. C, having submitted to the Lords of the Admiralty proposals and plans for converting wooden ships of war into armoured ships of war, and the official report being part of a collection of papers intended to give the public information as to the construction of ships of war, and the publication being made in good faith, A has not libelled B.

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[1] Folkard's Starkie, ch. xi. p. 223—248.

[2] *Hunter* v. *Sharpe*, 4 F. & F. 983; Folkard's Starkie, 232.

[3] Illustration (1).

[4] Illustrations (2), (3), and (4).

[5] *Dibdin* v. *Bostock*, 1 Esp. 28.

[6] *Henwood* v. *Harrison*, L. R. 7 C. P. 606.

(2.) [1] A publishes a caricature of B, an author, intended to convey the impression that his books were dull and ridiculous. A has not libelled B.

(3.) [2] B exhibits a picture at the annual exhibition of the Royal Academy. A writes a criticism on the pictures so exhibited, and calls B's picture "a mere daub." If this expresses A's honest opinion, A has not libelled B.

(4.) [3] B publishes an advertisement about a bag sold by him and called "the Bag of Bags." A publishes a criticism on the advertisement, saying, "The title is very silly, very slangy, and very vulgar." This may be a libel if it is meant to convey an imputation on B's way of managing his business, but is not a libel if it is only an expression of A's honest opinion as to the title given by B to his bag.

ARTICLE 275.

PARLIAMENTARY PROCEEDINGS, AND FAIR COMMENTS THEREON.

[4] It is not a misdemeanor to publish such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published; or,

[5] any extract from or abstract of such report, paper, votes, or proceedings, if it is shewn by the party accused that such extract or abstract was published *bonâ fide* and without [6] malice; or

[1] *Carr* v. *Hood*, 1 Camp. 354; Folkard's Starkie, 225–7; and see *Tabart* v. *Tipper*, 1 Camp. 350. *Carr* v. *Hood* is a strong case, because the caricature ridiculed not only the book but the author. It is one thing to say, "This book is absurd," another to say, "You are an absurd person because you have written this absurd book." This decision would cover (within limits) common political caricatures.

[2] *Thompson* v. *Shakell*, 1 M. & M. 187; Folkard's Starkie, 228.

[3] *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; Folkard's Starkie, 231.

[4] 3 & 4 Vict. c. 9, s. 1. The Act contains directions as to proof of the reports, &c.; see also *Stockdale* v. *Hansard*, 9 A. & E. 1. The existence of a narrower privilege than that conferred by the statute, viz. the privilege of publishing libellous papers to members of Parliament for their use, was never disputed; see *Lake* v. *King*, 1 Wms. Saunders, 137.

[5] 3 & 4 Vict. c. 9, s. 3.

[6] The word "malice" must here have its popular sense. In this connection, however, it has almost no meaning. A publishes an abstract of a parliamentary paper, which destroys the character of his deadly enemy B. He rejoices in the prospect of ruining B's character, and so publishes both *bonâ fide* and with malice. It is absurd to say he is indictable, yet if he is not, what is the sense of the word "malice?" It seldom has any meaning except a misleading one. It refers not to intention, but to motive, and in almost all legal inquiries intention, as distinguished from motive, is the important matter. Another objection to it is that its popular meaning is not barely ill will, but an ill will which it is immoral to feel. No one would describe legitimate indignation as "malice." The word is entirely avoided in the Indian Penal Code.

[1] a fair report of any debate in either House of Parliament, though any such publication may contain matter defamatory of the character of individuals; [2]but it is a libel to publish a report of a public meeting if it contains such matter, although such report is fair and is published in order to give the public information, and not in order to injure the person to whom the defamatory matter relates.

ARTICLE 276.

PUBLICATION IN A COURT OF JUSTICE.

It is not a misdemeanor to publish anything whatever in a judicial proceeding before a Court of competent jurisdiction, or in the discharge of any military duty, even if the person publishing knows the matter published to be false, and publishes it in order to injure the person to whom it relates.

Illustrations.

(1.) [3] A, before justices of the peace, exhibits articles of the peace against B, containing false and scandalous charges against B, in order to cause B to be bound over to good behaviour. This is not a libel.

(2.) [4] A, in an action between himself and B, falsely and maliciously swears an affidavit, charging C with fraud. The affidavit is not a libel.

(3) [5] A, a military witness before a military court of inquiry as to the conduct of B, makes in reference to the subject of that inquiry certain written statements affecting B. which are false to A.'s knowledge, and are intended to injure B. This is not a libel.

(4.) [6] A being the military superior of D, and being as such under a military duty to make a report on B.'s conduct to C., their common superior, makes a report which he knows to be false in order to injure B. The report is not a libel.

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[1] *Wason* v. *Walter*, L. R. 4 Q. B. 73.

[2] *Davison* v. *Duncan*, 7 E. & B. 231.

[3] *Cutler* v. *Dixon*, 4 Co. 14 b.

[4] *Henderson* v. *Broomhead*, 4 H. & N. 569, 576; see, too, *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255, and authorities cited there. Compare *Seaman* v. *Netherclift*, 1 C. P. Div. 540, for an illustration of the same principle as regards slander.

[5] *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744.

[6] *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94. Dissentiente Cockburn, C.J. I should doubt whether this law would be extended beyond the case of military duty.

Article 277.

FAIR REPORTS OF PROCEEDINGS OF COURTS.

[1] The publication of a fair report of the proceedings of a Court of justice is not a libel, merely because it defames the character of any private person; but such a publication may be an offence under Articles 91, 99, 161, or 172.

a report is said to be fair when it is substantially accurate, and when it is either complete or condensed in such a manner as to give a just impression of what took place, but this article does not extend to comments made by the reporter, or to reports of observations made by persons not entitled to take part in the proceedings.

Reports of ex parte proceedings are within this article if they are of a judicial nature, and proceedings before a magistrate under 11 & 12 Vict. c. 42, held with open doors, and with a view to the committal for trial of a suspected person, are judicial.

Illustrations.

(1.) [2] A publishes in a newspaper a fair report of the examination of a debtor before the registrar of a Bankruptcy Court. The examination contains irrelevant statements defaming B, who is a stranger to the proceedings. This is not a libel on B.

(2.) [3] A having been convicted of publishing a blasphemous libel, B publishes the trial, the blasphemous matter being given in full. B publishes a blasphemous libel.

(3.) [4] A publishes a report of proceedings for perjury against B, and omits certain parts of the cross-examination of the witnesses. This raises a question for the jury whether the effect of the omission is to make the report partial and inaccurate.

(4.) [5] A, in the last illustration, begins his report with an account of the proceedings out of which the charge of perjury against B arose, and observes, "Evidence was given by C and D which entirely negatived B's story." This statement is not within the article.

(5.) [6] A publishes in a newspaper an account of proceedings before a

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[1] *Curry* v. *Walter*, 1 B. & P. 525; *Hoare* v. *Silverlock* 9 C. B. 20; *Lewis* v. *Levy*, E. B. & E. 553.

[2] *Regalis* v. *Leader*, L. R. 1 Ex. 296, 300.

[3] *R.* v. *Carlisle*, 3 B. & A. 167.

[4] *Lewis* v. *Levy*, E. B. & E. 551.

[5] *Lewis* v. *Levy*, E. B. & E. 539.

[6] *Delegal* v. *Highley*, 3 Bing (N.C.) 960, 961.

magistrate against B. The report contains a statement by the magistrate's clerk that B's alleged conduct was exceedingly improper under any circumstances. This observation is not within this article.

(6.) [1] A publishes a fair report in a newspaper of a proceeding against B for perjury at a police court, which proceedings ended in the dismissal of the charge against B. This publication is not a libel.

(7.) [2] A publishes in a newspaper a fair report of statements of a defamatory kind, made before a magistrate extra-judicially, with a view to asking his advice. This publication may be a libel, as there is no judicial proceeding.

ARTICLE 278.

PUNISHMENT FOR LIBEL.

[3] Every one is liable to a maximum punishment of three years imprisonment and hard labour who

(*a.*) publishes, or threatens to publish, any libel; or

(*b.*) directly or indirectly proposes to abstain from, or offers to prevent the printing or publishing of any matter or thing touching any other person,

with intent,

(i.) To extort any money, or security for money, or any valuable thing from such or any other person; or

(ii.) to induce any person to confer or procure for any person any appointment or office of profit or trust.

[4] Every one is liable to a maximum punishment of two years imprisonment, and to pay such fine as the Court directs, who maliciously publishes any defamatory libel knowing it to be false,

[5] or [if he does not know it to be false], to a maximum punishment of one year's imprisonment, and to pay such a fine as the Court may direct.

[1] *Lewis* v. *Levy*, E. B. & E. 537; see, on the other hand, *Duncan* v. *Thwaites*, 3 B. & C. 556.

[2] *McGregor* v. *Thwaites*, 3 B. & C. 24.

[3] 6 & 7 Vict. c. 96, s. 3.

[4] Ibid. s. 4.

[5] Ibid. s. 5. The words bracketed are not in the Act, but are required to complete the sense.

PART VI.

OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS.

CHAP. XXXIII.—PROPERTY—POSSESSION—ASPORTATION—BAILMENT.

CHAP. XXXIV.—THINGS CAPABLE OR NOT OF BEING STOLEN.

CHAP. XXXV.—THEFT IN GENERAL.

CHAP. XXXVI.—EMBEZZLEMENT BY CLERKS AND SERVANTS.

CHAP. XXXVII.—ROBBERY AND EXTORTION BY THREATS.

CHAP. XXXVIII.—BURGLARY, HOUSE-BREAKING, ETC.

CHAP. XXXIX.—PUNISHMENTS FOR STEALING PARTICULAR THINGS AND RECEIVING GOODS UNLAWFULLY OBTAINED.

CHAP. XL.—OBTAINING PROPERTY BY FALSE PRETENCES AND OTHER CRIMINAL FRAUDS, AND DEALINGS WITH PROPERTY.

CHAP. XLI.—FRAUDS BY AGENTS, TRUSTEES, AND OFFICERS OF PUBLIC COMPANIES—FALSE ACCOUNTING.

CHAP. XLII.—RECEIVING.

CHAP. XLIII.—FORGERY IN GENERAL.

CHAP. XLIV.—PUNISHMENT OF PARTICULAR FORGERIES.

CHAP. XLV.—PERSONATION.

CHAP. XLVI.—OFFENCES RELATING TO THE COIN.

CHAP. XLVII.—MALICIOUS INJURIES TO PROPERTY.

CHAP. XLVIII.—OFFENCES RELATING TO GAME, WILD ANIMALS, AND FISH.

CHAP. XLIX.—OFFENCES CONNECTED WITH TRADE AND BREACH OF CONTRACT.

[1] CHAPTER XXXIII.

PROPERTY—POSSESSION—ASPORTATION—BAILMENT.

ARTICLE 279.

OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS.

THE violation of rights of property, and rights arising from contracts, is a crime in the cases specified in this part.

[1] This and the following chapter have I fear a somewhat abstract appearance, but it is impossible to understand the provisions of the Larceny Act without a knowledge of the doctrines which it presupposes—that is to say, the doctrine as to the definition of theft, and as to things capable of being stolen. The definition of theft turns on the doctrine of possession (see Note XVII), and this is unintelligible except in relation to the doctrine of property.

Such violation may be:

(1.) By taking away property from the owner without his consent

(*a.*) by violence to his person or habitation.

(*b.*) without such violence.

(2.) By persuading the owner by fraud to transfer his rights of property.

(3.) By the misappropriation of property entrusted by the owner to the offender.

(4.) By acts calculated to defraud, whether they actually defraud or not; that is to say—

(*a.*) Forgery.

(*b.*) Personation.

(*c.*) Coining and uttering bad money.

(5.) By wilful and malicious mischief done to property.

(6.) By breaches of certain kinds of contract and interference in certain cases with freedom of trade.

ARTICLE 280.

PROPERTY IN MOVEABLE THINGS.

[1]A person who has a right as against the world at large to do with or to any moveable thing anything which the law does not specifically forbid him to do with or to it, and the right to prevent all other persons from doing therewith or thereto anything whatever which they are not specifically authorized to do, either by law or by his consent, is said to be the general owner of that thing, and that thing is said to be his property, although he may have limited the above-mentioned rights respecting it as regards particular persons by contract.

*ARTICLE 281.

POSSESSION.

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other

* See Note XVII.

[1] 2 Austin, Jurisprudence, 876, 965.

persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

A moveable thing is in the possession of the husband of any woman, or the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure. The word "servant" here includes any person acting as a servant for any particular purpose or occasion.

The word "custody" means such a relation towards the thing as would constitute possession if the person having custody had it on his own account.

If a servant receives anything for his master from a third person, not being a fellow-servant, he has the possession as distinguished from the custody of it, until he has put it into his master's possession, by putting it into a place or thing belonging to his master, or by some other act of the same sort, whether the servant himself has or has not the custody of that place or thing.

If a servant receives anything belonging to his master from a fellow-servant who has received it from their common master, such thing continues to be in the possession of the master, unless the servant who delivered it delivered it with the intention to pass the property therein to the servant to whom it is delivered, having authority to do so from the master.

If a servant receives anything belonging to his master from a fellow-servant who has received it on the master's account, and has done no act to put it into the master's possession, it is in the possession of the servant who so receives it, and not in his custody merely.

Illustrations.

(1.) [1]A, the master of a house, gives a dinner party, the plate and other things on the table are in his possession, though from time to time they are in the custody of his guests or servants.

(2.) [2]A assigns the goods in his house to trustees for the benefit of his creditors. The trustees leave him undisturbed and do not in any way

[1] Founded on 1 Hale, P. C. 506.

[2] *R.* v. *Pratt*, Dear. 360.

interfere with the goods. A and not the trustees is in the possession of the goods.

(3.) [1]A produces a receipt stamp, and gets B to write a receipt on it in A's presence as for money paid by A to B. The stamp is in A's not B's possession.

(4.) [2]A buys a bureau from B at a sale with money in a secret drawer, of the existence of which neither A nor B is aware. The money is not in B's possession (though the bureau which contains it is) because B cannot be presumed to intend to act as the owner of it when he discovers it.

(5.) [3]A is clerk to B, a banker, money is paid to A on B's account, A keeps it for a short time, and then puts it into the till. The money is in A's possession till it is put into the till, when it passes into B's possession, though A may have the custody of it.

(6.) [4] B leaves a watch with its maker to be regulated. A writes to the maker to send the watch to B at a certain post-office. A then goes to the post-office, and pretending to be B, gets the watch. As soon as the watch reaches the post-office addressed to B, it is in B's possession, as the post-master, as regards the letter and watch, is the servant of the owner.

(7.) [5] B being prevented by a crowd from getting near the pay-place at a railway station, hands a sovereign to A, who is close to it, to pay for her ticket, and give her the change. The sovereign is in B's possession, but in A's custody.

(8.) [6]B sends his servant A with a cart of B's to fetch coals for B from C. A receives the coals from C, carries them in sacks on his back to the cart, puts them into the cart, and drives it back to B. The cart is throughout in B's possession, but in A's custody. The coals are in A's possession whilst he is carrying them on his back to the cart, but as soon as they are deposited in the cart they are in the possession of B, though both coals and cart continue to be in the custody of A.

(9.) [7] A, B's servant, obtains by false pretences B's money from C another of B's servants. The money after such obtaining is still in B's possession.

(10.) [8] A, B's servant, obtains by false pretences from C, B's cashier, the property in coins which belonged to B. till C. gave them to A. The possession of the coins is in A.

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[1] *R.* v. *John Smith*, 2 Den. 449.

[2] *Cartwright* v. *Green*, 8 Ves. 405; *Merry* v. *Green*, 7 M. & W. 623.

[3] *Bazeley's Case*, 2 Leach, 835. This case led to the first Act against embezzlement by clerks and servants. No opinion was publicly delivered in it, but the judges seem to have considered that the act was not felony. Several similar cases are quoted in the argument.

[4] *R.* v. *Kay*, D. & B. 236. See Bramwell, B.'s, remarks on this case in *R.* v. *Middleton*, L. R. 2 C. C. R. 58.

[5] *R.* v. *G. Thompson*, L. & C. 225.

[6] *R.* v. *Reed*, Dear. 168, 257.

[7] *R.* v. *Cooke*, L. R. 1 C. C. R. 295; and see *R.* v. *Robins*, Dear. 418.

[8] *R.* v. *H. Thompson*, L. & C. 233.

(11.) [1] A, B, and C are all servants to D. D's customers pay money to C, who pays it to A, who pays it to B. B, A, and C each keep separate accounts of their receipts and payments, so as to be checks on each other. Money of D's paid by C to A is in A's possession, and not merely in his custody.

ARTICLE 282.

SPECIAL OWNER.

[2] Every person to whom the general owner of a moveable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein, and such special property is not divested if the special owner parts with the possession under a mistake.

ARTICLE 283.

POSSESSOR SPECIAL OWNER AS AGAINST STRANGER.

Every person who has obtained by any means the possession of any moveable thing is deemed to be the special owner thereof, as against any person who cannot show a better title thereto.

Illustrations.

(1.) [3] A finds a bezoar-stone in the street and shows it to B, a jeweller, to ascertain its value. B keeps it. A has a right to the stone as against B.

(2.) [4] A steals B's watch. C picks A's pocket of the watch. C steals from A.

ARTICLE 284.

TAKING AND CARRYING AWAY.

A thing is said to be taken and carried away when every part of it is moved from that specific portion of space which

[1] *R.* v. *Masters*, 1 Den. C. C. 332. Mr. Greaves disapproves of this decision, and thinks that in such a case the money would be in the master's possession as soon as the first servant received it on his account. *R.* v. *Murray*, Ry. & Moo. 276, perhaps favours this view, but the whole doctrine of possession is so arbitrary and unreal that it is hard to say that one view is better or worse than another.

[2] *R.* v. *Vincent*, 2 Den. 464.

[3] *Armory* v. *Delamirie*, 1 S. L. C. 357,

[4] Founded on 1 Hale, P. C. 507.

it occupied before it was moved (although the whole of it may not be moved from the whole of the space which it occupied), and when it is severed from any person or thing to which it was attached in such a manner that the taker has, for however short a time, complete control of it. An animal is said to be taken and driven or led away when it is caused to move from the place where it was before.

Illustrations.

(1.) [1] A removes a parcel from one end of a waggon to another. This is a taking and carrying away.

(2.) [2] A lifts a sword partly out of its scabbard. A has taken and carried away the sword.

(3.) [3] A causes a horse to be led out of a stable for him to mount. A has led away the horse.

(4.) [4] A, a postman, instead of delivering a letter in due course, or bringing it back in his pouch which would be his duty if he could not deliver it, puts it in his pocket intending to steal it. This is a taking and carrying away.

(5.) [5] A snatches a diamond earring from a lady's ear, tearing it out of the ear; it drops from his hand into her hair, and is found there by her afterwards. A has taken and carried away the earring.

(6.) [6] Goods are tied to a string, one end of which is fastened to the bottom of a counter. A takes and carries them as far as the string will permit. A has not carried away the goods.

(7.) [7] A has gas-pipes in his house running through a meter, such pipes being his property. In order to prevent the gas from passing through the meter he puts a connecting pipe between the pipe leading to, and the pipe leading from, the meter, and so diverts the gas from its proper course. This is a taking and carrying away of the gas.

Article 285.

BAILMENT DEFINED.

When one person delivers, or causes to be delivered, to

[1] *Coslet's Case*, 1 Lea. 236.

[2] *R.* v. *Walsh*, 2 Russ. Cr. 153 (from MS. of Bayley, J.). An odd point would arise if the sword and scabbard were merely twisted round in the place which they occupied before they were touched. I suppose this would not be an asportation.

[3] *R.* v. *Pitman*, 2 C. & P. 423.

[4] *R.* v. *Poynton*, L. & C. 247.

[5] *Lafrier's Case*, 1 Lea. 320; *R.* v. *Simpson*, Dears. 421. In this case a watch and chain snatched out of one button-hole caught in another.

[6] 2 East, P. C. 556.

[7] *R.* v. *White*, Dear. 203.

another any moveable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as a pledge by the person to whom delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made shall be delivered either to the person making the delivery or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered, the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee.[1]

[1] *Coggs* v. *Bernard*, 2 S. L. C. 188, for bailment in general. For the application of the doctrine to criminal law, *R.* v. *Hassell*, L. & C. 58. It seems that a married woman may be a bailee: *R.* v. *Robson*, L. & C. 93. Since the Married Women's Property Act (33 & 34 Vict. c. 93) it would seem clear that in many

CHAPTER XXXIV.

THINGS CAPABLE OR NOT OF BEING STOLEN.

ARTICLE 286.

THINGS CAPABLE OF BEING STOLEN.

THINGS are or not capable of being stolen according to the provisions contained in this chapter.

ARTICLE 287.

MOVEABLE THINGS—LAND—THINGS FIXED TO LAND.

[1]All moveable things are capable of being stolen, whether they are naturally moveable or whether they were, before being severed therefrom, a part of, or built upon, or growing out of, or fixed in a permanent manner to, the soil of the earth.

The soil of the earth itself cannot be stolen, by removing landmarks, building so as to make permanent encroachments, or other means of the same kind.

Things growing out of, built upon, permanently attached to, or forming part of the soil, cannot be stolen whilst they continue to be so attached to it or to form part of it, or by the act of severance, [2]except in the cases provided for in Articles 326, 327 (*c*), (*d*), (*e*), and 328 (*h*), (*i*), (*k*), (*l*).

ARTICLE 288.

TITLE-DEEDS AND CHOSES IN ACTION.

[3]Documents which in any way relate to the title to real property, and documents which constitute evidence of any right of action against any person, are not capable of being stolen, unless they fall within the terms of Article 323 or 327 (*a*); but documents of title to chattels and tokens which represent them are capable of being stolen.

[1] 2 Russ. Cr. 251-260.

[2] See also Article 296, para. (3).

[3] 2 Russ. Cr. 260-278.

Illustrations.

(1.) [1] An unstamped written agreement for building cottages under which work has been and is being carried on is not capable of being stolen.

(2.) [2] A pawnbroker's ticket is capable of being stolen.

ARTICLE 289.

WATER.

[3] Running or standing water is not capable of being stolen unless [it seems] it is stored in pipes or reservoirs for the purpose of sale or use, in which case it is capable of being stolen, although money penalties are provided for an improper use of it.

[4] Gas is capable of being stolen.

ARTICLE 290.

TAME ANIMALS AND WILD ANIMALS IN CAPTIVITY.

(*a*.) [5] The following animals are capable of being stolen at common law:

Tame animals, whether originally wild or not, birds, bees, and silkworms kept respectively for food, labour, or profit, their young and their produce;

Hawks kept for sport;

Wild animals in a state of captivity kept for food or profit,[6] but not wild animals kept in a state of captivity for curiosity.

[1] *R.* v. *Watts*, Dear. 326.

[2] *R.* v. *Morrison*, Bell, C. C. 158. It has been held that a railway ticket is capable of being stolen: *R.* v. *Boulton*, 1 Den. 508. In *R.* v. *Kilham* (L. R. 1 C. C. R. 264) it is said that "the reasons for this decision do not very clearly appear." It is, indeed, very hard to reconcile the decision with the established principle as to "choses in action," for what is a railway ticket except evidence of a contract by the railway to carry the holder?

[3] "Water is a moveable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary transient usufructuary property therein" (Blackstone, 1 Steph. Com. 173, 5th Ed.). There are decisions as to stealing water from pipes, but I cannot find them. One or two, which I think were not reported, have within the last few years been given at the Leeds Assizes.

[4] *R.* v. *Firth*, L. R. 1 C. C. R. 172; *R.* v. *White*, Dear. 283.

[5] 2 Russ. Cr. 253–4 (5th Ed.)

[6] 2 Russ. Cr. 238 (5th Ed.)

(*b.*) The following animals are the subjects of larceny by statute:

[1] Dogs, birds, beasts, and other animals ordinarily kept in a state of confinement, or for any domestic purpose.

(*c.*) [2] Animals of a base nature are not capable of being stolen either at common law or by statute unless they are ordinarily kept in a state of confinement, or for any domestic purpose, in which case they are the subjects of larceny by statute.

[2] An animal capable of being stolen, whatever may be its nature, does not cease to be capable of being stolen because it is permitted at certain times to wander abroad.

Illustrations.

(1.) [3] The milk of a cow, the wool on a sheep's back, honey in a hive, are the subjects of larceny at common law.

(2.) [4] Young partridges or pheasants reared under a domestic fowl are regarded as tame, and as such are the subjects of larceny at common law till they become wild.

(3.) [5] Deer in a paddock, rabbits in a hutch, are the subjects of larceny at common law. Bears or monkeys kept in dens are the subjects of larceny by statute.

(4.) [6] Young partridges reared under a common hen do not cease, so long as they are practically under the dominion of their owner, to be the subjects of larceny at common law because they are allowed to wander abroad.

(5.) [7] Pigeons in a dovecot are the subjects of larceny at common law although they are allowed to fly about.

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[1] 24 & 25 Vict. c. 96, ss. 18 and 21. See Article 328.

[2] Coke, 3rd Inst. 108, 9; 2 Russ. Cr. 278–82. Ferrets, so far as I know, are the only animals to which (*c*) has been applied in modern times. In *R.* v. *Searing*, R. & R. 350, "It appeared in evidence that ferrets are valuable animals, and those in question were sold by the prisoner for 9*s*. The judges were of opinion (in 1818) that ferrets though tame and saleable could not be the subject of larceny." I know not whether a ferret would fall within (*b*) or not. It is necessary to mark the distinction between animals which are the subject of larceny at common law and those which are the subject of larceny by statute, because it is recognised in several statutes. See Articles 328 (*d*) and (*f*) and 329.

[3] 2 Russ. Cr. 233–4 (5th Ed.)

[4] *R.* v. *Shickle*, L. R. 1 C. C. R. 158; *R.* v. *Cory*, 10 Cox, C. C. 23.

[5] 2 Russ. Cr. 233–4, 238 (5th Ed.)

[6] *R.* v. *Shickle*, L. R. 1 C. C. R. 158.

[7] *R.* v. *Cheafor*, 2 Den. 361. It has not, however, been decided that pigeons can be stolen whilst actually flying about apparently at liberty. I suppose the question would turn on the knowledge of the offender that the pigeons were tame.

Article 291.

WILD ANIMALS LIVING AND DEAD.

[1] Living wild animals in the enjoyment of their natural liberty, whether they have escaped from confinement or not, are not capable of being stolen, although they may be game, and although it may be an offence to pursue or kill them;[2] but the dead body of such an animal is capable of being stolen, and it becomes the property of the person on whose ground the animal dies.[3]

Article 292.

DEAD BODIES.

[4] The dead body of a human being is not capable of being stolen.

Article 293.

THINGS ABANDONED.

[5] Things of which the ownership has been abandoned are not capable of being stolen.

Illustrations.

(1.) [6] To convert treasure trove before office found is not theft.

(2.) [7] To convert wreck of the sea is not theft [if the owner is unknown].

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[1] 2 Russ. Cr. 236 (5th Ed.)

[2] See Chapter XLII. Oysters are the subject of larceny by statute; see Art. 327 (*f*), but they can hardly be called "living wild animals."

[3] *Blades* v. *Higgs*, 11 H. L. C. 621; 34 L. J. (C.P.) 286. But see *R.* v. *Townley*, L. R. 1 C. C. R. 315, and Article 296, 3rd paragraph.

[4] *R.* v. *Haynes*, 2 East, P. C. 652. Can skeletons and anatomical preparations of parts of dead bodies, or which formerly formed parts of bodies when living, be stolen?—teeth, for instance, intended to be used as false teeth.

[5] 2 East, P. C. 606–7.

[6] 3 Inst. 108. It is however a misdemeanor, see Article 342.

[7] 1 Hawk. P. C. 149, s. 38. This must be understood of wreck of the sea unclaimed, and now of wreck not forming part of or belonging to a vessel in distress, as to stealing which see Article 258 (*g*). Penalties for various offences as to wreck are contained in 17 & 18 Vict. c. 104, s. 477–9 (the Merchant Shipping Act, 1854).

(3.) [1] To convert goods absolutely lost to the owner, and as to which there is no reasonable ground for believing that the owner can be found, is not theft.

Article 294.

THINGS OF NO VALUE.

[2] Things of no value to any one are not capable of being stolen, but things valuable to no one but the owner are capable of being stolen.

Illustration.

[2] The paper and stamps of the notes of a firm of country bankers which have been paid by the London correspondent and which are capable of being re-issued by the country bankers may be stolen, because they are valuable to the country bankers (as saving the expense of printing new notes), though to no one else.

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[1] The law as to finding property is more fully stated in Article 302.

[2] *Clarke's Case*, 2 Lea. 1036.

CHAPTER XXXV.

THEFT IN GENERAL.

ARTICLE 295.

DEFINITION OF THEFT.

[1] THEFT is the act of dealing, from any motive whatever, unlawfully and without claim of right with any thing capable of being stolen, in any of the ways in which theft can be committed, with the intention of permanently converting that thing to the use of any person other than the general or special owner thereof. Provided that the offences defined in Articles 339 and 340 do not amount to theft.

The ways in which theft can be committed are specified in Articles 296 to 300, both inclusive. In those articles the word "convert" means such a conversion as is hereinbefore specified.

A claim of right may be founded on a mistake of law.

Illustrations.

(1.) [2] A takes B's horse from his stable and backs him down a coal-pit a mile off, in order to prevent the horse from being identified in the trial of C for stealing it. A steals B's horse.

(2.) [3] A, a post-office clerk, drops two letters down a water-closet in order that a mistake which he had made in sorting them might not be discovered. A steals the letters.

(3.) [4] A, a servant, gets B's letters from the post-office, and destroys one of them written to B by C, A's mistress, making inquiries of B as to A's character, delivering the rest. A steals the letter.

(4.) [5] A, a puddler, throws an iron axle into his furnace in order to increase the apparent amount of iron puddled therein, on which A's wages depend. The axle, worth 5*s*., is destroyed, though the iron of which it is composed, and which is much less valuable, remains for the owner. A has stolen the axle.

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[1] *R.* v. *Holloway*, 1 Den. 370.

[2] *R.* v. *Cabbage*, R. & R. 292; 2 Russ. Cr. 146–7.

[3] *Wynn's Case*, 1 Den. 365.

[4] *R.* v. *Jones*, 1 Den. 188.

[5] *R.* v. *Richards*, 2 Russ. Cr. 147–8. This case is not altogether easy to reconcile with *R.* v. *Webb*; see Illustration (9).

(5.) [1] A, without his master's leave, takes his master's corn to feed his master's horses. This was theft till the passing of 26 & 27 Vict. c. 103.

(6.) [2] A gleans corn, not having, but believing himself to have, a legal right to do so. This is not theft.

(7.) [3] B, a gamekeeper, takes snares set by A, a poacher, and a dead pheasant caught therein. A, honestly believing that the snares and pheasant were his property, and that he had a legal right to them, forces B by threats to return them. This is not robbery, and if no violence was used would not be theft.

(8.) [4] A, believing that B owes him £11, and seeing B receive £7, knocks down B and tries to get the £7 out of his pocket, saying "Pay me the eleven sovereigns you owe me." This is not robbery, and if no violence were used would not be theft.

(9.) [5] The ore in a mine belongs to adventurers, and is to be excavated by tributers. One set of tributers are to be paid a larger sum in the pound than the other set for the ore excavated by them. The ore excavated by each set is placed in a heap by itself. A, one of the tributers, moves a quantity of ore from the heap to be paid for at the lower to the heap to be paid for at the higher rate. A has not stolen the ore.

(10.) [6] Workmen in the glove trade are paid according to the number of gloves finished by them. A (a workman) takes gloves from his master's warehouse and puts them in the place where the newly finished gloves are put to be counted, so as to increase the apparent number of newly finished gloves, and with intent fraudulently to obtain payment for the gloves so removed from the warehouse. This is not theft.

(11.) [7] B uses many bags in his trade, and is supplied with them by C. A, B's servant, takes old bags supplied by C to B from B's house, and puts them in a place outside B's house, where new bags were habitually put by C. C, by concert with A, claims payment for the bags from B as for bags newly supplied. A is guilty of theft, and C is an accessory before the fact.

Article 296.

THEFT BY TAKING AND CARRYING AWAY.

[8] Theft may be committed by taking and carrying away without the consent of the owner (even if he expects and affords facilities for the commission of the offence), anything which is not in the possession of the thief at the time when

[1] *R.* v. *Morfit*, R. & R. 307.

[2] 2 Russ. Cr. 164–5. Commenting on Woodfall, Landlord and Tenant.

[3] *R.* v. *Hale*, 3 C. & P. 409.

[4] *R.* v. *Boden*, 1 C. & K. 395.

[5] *R.* v. *Webb*, R. & M. 431. By 24 & 25 Vict. c. 96, s. 39, which re-enacts an earlier Act passed in consequence of this decision, this is now felony; see Article 270.

[6] *R.* v. *Poole*, D. & B. 345; *R.* v. *Holloway*, 1 Den. 370, is similar in principle.

[7] *R.* v. *Manning*, Dear. 21; *R.* v. *Hales*, 1 Den. 381, is very like this case.

[8] Cases in Illustrations.

the offence is committed,[1] whether it is in the possession of any other person or not.

If the thing taken and carried away is on the body or in the immediate presence of the person from whom it is taken, and if the taking is by actual violence intentionally used to overcome or to prevent his resistance, or by threats of injury to his person, property, or reputation, the offence is robbery.

[2]If the thing taken and carried away is for the first time rendered capable of being stolen by the act of taking and and carrying away, and if the taking and carrying away is one continuous act, such taking and carrying away is not theft (except in the cases provided for in Articles 326, 327 (*c*), (*d*), (*e*), (*f*), 328 (*h*), (*i*), (*k*), (*l*). It seems that the taking and carrying away are deemed to be continuous if the intention to carry away after a reasonable time exists at the time of the taking.

Illustrations.

(1.) [3] A finds lost property, knowing who the owner is, and converts it. This is theft.

(2.) [4] A, a trespasser, finds a dead rabbit lying in a wood, of which he is not the owner, and converts it. This is theft.

(3.) [5] A carpenter finds nine hundred guineas in a bureau lent to him to repair, and converts them. This is theft.

(4.) [6] A finds iron dropped from some canal boat or other, at the bottom of a canal, from which the water has been let off, and converts it. This is theft.

(5.) [7] A instigates B, C's servant, to help A to steal money in C's desk. B tells his master, C. C, in order to detect A, tells B to go on with the business, and so arranges matters as to give A and B opportunities to break open the desk and take the money. This is theft in A.

(6.) [8] A snatches a bundle from B's hand, and runs away with it. This

[1] Property in no one's possession is said to be constructively in the possession of its owner, the object of this fiction is to satisfy a supposed necessity for showing that the taking in theft must be a taking out of some one's possession.

[2] *R* v. *Townley*, L. R. 1 C. C. R. 315.

[3] See Article 302 on "Finding."

[4] *Blades* v. *Higgs*, 11 H. L. C. 621.

[5] *Cartwright* v. *Green*, 8 Ves. 405.

[6] *R.* v. *Rowe*, Bell, C. C. 93. In this case Pollock, C.B., said the company had "sufficient possession to maintain an indictment for larceny." The "possession" in question could scarcely be called actual.

[7] *R.* v. *Egginton*, 2 East, P. C. 666.

[8] Six cases all to this effect are collected in 2 Russ. Cr. 109.

is theft, and not robbery, as the violence used was only to get possession of the bundle.

(7.) [1] A, at a mock auction, knocks down goods to B, who has not bid for them, pretending that she has. On B's offering to go, A says she shall not be allowed to go unless she pays for the goods knocked down to her, which she does. This is theft at least, and perhaps robbery.

(8.) [2] A snatches at a sword worn by B. A and B struggle for the sword, and A gets it. This is robbery.

(9.) [3] A, in cutting the string by which a basket is tied, with intent to steal it, accidentally cuts the wrist of the owner, who at the same moment tries to seize and keep it. The cut causes the owner to withdraw her hand, and the thief gets the basket. This is theft, but not robbery, because the actual violence was not intentional.

(10.) [4] A, B, and C surround D in such a way as to make resistance by D practically useless, and take his watch, without actual force or threat. This is robbery.

(11.) [5] A mob of seventy persons demands money of a person, threatening, if he refuses, to tear his mow of corn and level his house; he gives it. This is robbery.

(12.) [6] A compels B to give him money, by threatening to accuse A of an infamous crime. This is robbery.

(13.) [7] A rips lead off a church, to the roof of which it is fixed, and carries it away. This is not theft at common law though it is by statute.

(14.) [7] A cuts down timber or growing crops and carries them away immediately. This is not theft at common law though it is by statute.

(15.) [8] A, a poacher, kills a number of rabbits, hides them in a ditch on the ground of the owner of the soil on which they were killed, and returns several hours afterwards and carries them away, having all along intended to do so at his convenience. This is not theft.

ARTICLE 297.

THEFT BY A SERVANT. EMBEZZLEMENT.

Theft may be committed by converting, without the consent of the owner, anything of which the offender has received

[1] *R.* v. *McGrath*, L. R. 1 C. C. R. 205. The case of *R.* v. *Morgan*, Dear. 395, is somewhat similar.

[2] *Davis's Case*, 2 East P. C. 709.

[3] *R.* v. *Edwards*, 1 Cox, C. C. 32; 2 Russ. Cr. 110.

[4] *Hughes's Case*, 1 Lewin, 301.

[5] *Simon's Case*, 2 East, P. C. 731.

[6] See cases collected in 2 Russ. Cr. 119-124. Some distinctions arise upon this which I do not notice because this most odious crime is now dealt with specially by statute. See *post*, Article 314.

[7] See authorities collected 2 Russ. Cr. (5th ed.) 209-10.

[8] *R.* v. *Townley*, L. R. 1 C. C. R. 315.

the custody as the servant of the owner, or in order that the thing may be used by the offender for some special temporary purpose in the presence or under the immediate control of the owner or his servant.

[1] When a clerk, or servant, or person employed in the capacity of a clerk or servant, converts anything received by him from another person for his master or employer, he is deemed to have stolen it, but his offence is commonly called embezzlement, and is distinguished from theft for the purposes and in the manner mentioned in Chapter XXXVI.

Illustrations.

(1.) [2] A carter converts to his own use a cart which he is driving for his master. He commits theft.

(2.) [3] A is employed by B to take pigs to C to be looked at, and to bring them back to B, whether C wishes to buy them or not. A sells the pigs to some one else, and keeps the money. This is theft.

(3.) [4] A sheriff's officer, in possession of goods under a writ of fi. fa., sells part of them. This is theft, as such a person is in the position of a servant.

(4.) [5] A guest at a tavern carries off a piece of plate set before him to drink from. This is theft, because A had only a permission to use the plate for a special limited purpose.

Article 298.

THEFT BY A FALSE PRETENCE.

Theft may be committed by fraudulently obtaining from the owner a transfer of the possession of a thing, the owner intending to reserve to himself his property therein, and the offender intending, at the time when the possession is obtained, to convert the thing without the owner's consent to such conversion.

Illustrations.

(1.) [6] A fraudulently persuades B to allow A to take two silver ewers to show to A's master, to choose one if he pleased. A sells the ewers and keeps the money. This is theft.

[1] See Chapter XXXVI.
[2] *Robinson's Case*, 2 East, P. C. 565.
[3] *R.* v. *Harvey*, 9 C. & P. 353.
[4] *Rushall's Case*, 2 Russ. Cr. 382.
[5] 1 Hale, P. C. 506.
[6] *R.* v. *Davenport*, 2 Russ. Cr. 201.

(2.) [1] A, by pretending to be B, fraudulently obtains B's goods from C, a carrier, to whom they were entrusted by B. This is theft, as the carrier transferred the possession only.

(3.) [2] A fraudulently bargains with B for the purchase by A of goods for ready money, and fraudulently induces B to let A have the goods, pretending that he is then about to pay B the price. A then takes away the goods, and does not pay the price. This is theft, as in such cases the purchaser does not mean to transfer the property till the money is paid.

(4.) [3] A fraudulently obtains goods and money from a shopkeeper by pretending to give him diamonds for them. This is not theft, as the shopkeeper means to transfer the property in the goods.

(5.) [4] A fraudulently induces B to give her ten sovereigns to conjure with, promising to bring back the ten sovereigns and 170*l.*, to which A said B was entitled. A carries off the ten sovereigns. If the ten sovereigns were to be returned, this is theft. If not, it is not theft, but is obtaining money by false pretences.

(6.) [5] A, B's wife, by a forged order gets money standing to B's credit at B's bankers. This is not theft from the bankers, as the cashier had a general authority to part with the banker's money, and meant to do so.

Article 299.

THEFT BY TAKING ADVANTAGE OF A MISTAKE.

Theft may be committed by [6] converting property which the general or special owner has given to the offender under a mistake which the offender has not caused, but which he knows to be such at the time when it is made, and of which he fraudulently takes advantage.

But it is doubtful whether it is theft fraudulently to convert property given to the person converting it under a mistake of which that person was not aware when he received it.

Illustrations.

(1.) [6] A having to receive ten shillings from a post-office savings bank, produces to the clerk a warrant for that amount. The clerk referring by

[1] *R.* v. *Longsheith*, 2 Russ. Cr. 203; R. & M. 137. There are a great number of other cases to the same effect. *R.* v. *Mackall*, e.g., L. R. 1 C. C. R. 125.

[2] Four cases to this effect are stated in 2 Russ. Cr. 209–11.

[3] *R.* v. *Bunce*, 1 F. & F. 523. The offence would be obtaining goods by false pretences.

[4] *R.* v. *Bunce*, 1 F. & F. 523.

[5] *R.* v. *Prince*, L. R. 1 C. C. R. 150.

[6] *R.* v. *Middleton*, L. R. 2 C. C. R. 38. Perhaps "by knowingly accepting with intent to convert" would be a more accurate way of expressing the effect of this case.

mistake to another letter of advice, puts on the counter 8*l.* 16*s.* 10*d.*, which A takes away. This is theft.

(2.) [1] A gives a cabman a sovereign for a shilling. The cabman, seeing that it is a sovereign, keeps it. This is theft of the sovereign.

(3.) [2] A receives a letter containing a cheque. The letter is addressed, and the cheque is payable, to another person of the same name as A. A receives the letter innocently, but, on discovering the mistake made, converts the cheque to his own use. This is not theft.

(4.) [3] A buys a bureau at a public auction, and finds in it property not intended to be sold, which he converts to his own use. This is theft.

ARTICLE 300.

THEFT BY BAILEES.

[4] Theft may be committed by the conversion by a bailee of the thing bailed, but this does not extend to any offence punishable on summary conviction.

ARTICLE 301.

BY AND FROM WHOM THEFT MAY BE COMMITTED.

Theft may be committed by a general owner to the prejudice of a special owner upon a chattel in which both general and special ownership exist.

[5] Theft may be committed by a member of a co-partnership, or by one of two or more beneficial owners of any money, goods, effects, bills, notes, securities, or other property, to the prejudice of the other co-partners or beneficial owners.

[1] Per eight Judges, in *R.* v. *Middleton*, L. R. 2 C. C. R. at p. 45.

[2] *R.* v. *Muchlow*, 1 Mood. C. C. 160; *R.* v. *Davies*, Dear. 640.

[3] *Merry* v. *Green*, 7 M. & W. 623. There was a question in this case whether the bureau was not sold with its contents. *Cartwright* v. *Green*, 8 Ves. 405, is almost precisely similar. I am unable to distinguish these cases from those on which Illustration (3) is founded. It is remarkable that in the judgments, and apparently in the argument (which is not reported), in *R.* v. *Middleton*, no notice is taken of any of these cases, nor are the cases about the bureaus referred to in *R.* v. *Davies*, which was decided, without argument, solely on the authority of *R.* v. *Muchlow*. *Cartwright* v. *Green* is not referred to in *R.* v. *Muchlow*, which was decided before *Merry* v. *Green*. *Merry* v. *Green* does not refer to *R.* v. *Muchlow*. The result is that the cases appear to contradict each other.

[4] 24 & 25 Vict. c. 96, s. 4. For a recent instance of this offence, see *R.* v. *Oxenham*, 46 L. J. (M. C.) 125.

[5] 31 & 32 Vict. c. 116, s. 2.

[1] Theft may be committed by a member of a corporation to the prejudice of that corporation upon a thing which is the property of the corporation.

[2] A married woman cannot commit theft upon things belonging to her husband.

If any other person assists a married woman in dealing with things belonging to her husband in a manner which would amount to theft in the case of other persons, [3] such dealing is not theft [4] unless the person so assisting commits or intends to commit adultery with the woman, [5] in which case he, but not she, commits theft. [6] But this exception does not apply to the case of an adulterer or person intending to commit adultery, who assists a married woman to carry away her own wearing apparel only from her husband.

[7] It is doubtful whether the mere presence and consent of a married woman on an occasion when some person deals with her husband's goods in a way which would otherwise amount to theft excuses such person if he acts as a principal in the matter, and not as her assistant.

Illustrations.

(1.) [8] A bails goods to B for exportation, upon which A would become entitled to an exemption from a duty on the goods of 2*s*. 6*d*. a pound. B gives a bond to the Crown for exportation, and sends the goods in his barge to a ship to be exported. A, to get the goods duty free, takes them from B's barge. A has stolen the goods from B, and it seems it would have been larceny if no bond had been given by B.

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[1] Roscoe's Crim. Ev. 8th Ed. 652. This is Mr. Roscoe's inference from Hale, P. C. 513, and appears to be correct.

[2] 1 Hale, P. C. 514.

[3] *Harrison's Case*, 2 East, P. C. 539.

[4] *R.* v. *Avery*, Bell, 150.

[5] *R.* v. *Tolfree*, Mood. 243; *R.* v. *Thompson*, 1 Den. 549; *R.* v. *Tollett*, Car. & Mar. 112; *R.* v. *Featherstone*, Dear. 369; *R.* v. *H. Mutters*, L. & C. 511. A note to this case, 516–19, collects and reviews all the authorities on the subject.

[6] *R.* v. *Fitch*, D. & B. 187.

[7] *R.* v. *Avery*, Bell, C. C. 153. I submit that the wife's presence and consent in such a case would be no excuse. See the history of the growth of the doctrine in the note to *R.* v. *Mutters*.

[8] *R.* v. *Wilkinson*, 2 Russ. Cr. 286.

(2.) [1] A gives his servant goods to carry to a certain place. A then disguises himself and robs his servant in order to charge the hundred with the robbery. This is robbery.

Article 302.

FINDING GOODS.

A finder of lost goods who converts them commits theft, if at the time when he takes possession of them he intends to convert them, knowing who the owner is, or having reasonable grounds to believe that he can be found;

Such a conversion is not theft

(*a.*) if at the time when the finder takes possession of the goods he has not such knowledge or grounds of belief as aforesaid, although he acquires them after taking possession of the goods, and before resolving to convert them; or

(*b.*) if he does not intend to convert the goods at the time when he takes possession of them, whether he has such knowledge or grounds of belief or not at any time.

If the circumstances are such as to lead the finder reasonably to believe that the owner intended to abandon his property in the goods, the finder is not guilty of theft in converting them.

Illustrations.

(1.) [2] A finds a bank note, accidentally dropped on the floor of his shop. He picks it up, intending to keep it for himself, whoever the owner might be, believing at the time that the owner could be found. This is theft.

(2.) [3] A, a carpenter to whom a bureau was entrusted to mend, finds money in it, the existence of which was obviously unknown to the owner

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[1] Foster, 123–4. I have not met with any case in which a man has been convicted of theft for stealing a pledge (his own property) from a pawnbroker; but no doubt such an act would be theft. Before 31 & 32 Vict. c. 116, s. 2, a case occurred in which a part owner was convicted of stealing money from another part owner, in whose special custody it was, and who was solely responsible for its safety, the money being the property of a co-operative st re: *R.* v. *Webster*, L. & C. 77. The same point was decided, as to the property of a friendly society, in *R.* v. *Burgess*, L. & C. 299.

[2] *R.* v. *Moore*, L. & C. 1.

[3] *Cartwright* v. *Green*, 8 Ves. 405; see, too, *Merry* v. *Green*, 7 M. & W. 623.

of the bureau. A appropriates the money. This is theft, as A knew to whom the bureau belonged.

(3.) [1] A finds iron in the bottom of a canal, from which the water had been let off, and appropriates it. This is theft, as the fact that the iron was in the canal raised a presumption that it had fallen from a canal boat, and that therefore the canal company had a special property in it.

(4.) [2] A finds a sovereign in the road, and picks it up, intending to keep it, whoever the owner might be, but not knowing who he was, and having no reason to believe he could be found. This is not theft.

(5.) [3] A finds a bank note in the road, with no mark upon it, and no circumstance to indicate who was the owner, or that he might be found. Next day he hears who the owner is, and after that changes the note and keeps the money. This is not theft.

(6.) [4] A finds a bank note in the road with the owner's name upon it, and takes it, intending at the time to return it to the owner, but afterwards changes his mind and keeps it for himself. This is not theft.

(7.) [5] A finds an apple, which appears to have been thrown away in a road, and eats it. If A reasonably believed that the apple had been abandoned by its owner, this is not theft.

Article 303.

CONVERSION AFTER A TAKING AMOUNTING TO TRESPASS.

If a person takes into his custody any chattel belonging to any other person in a way which constitutes an actionable wrong to that person and afterwards converts it, he commits theft, although he may not have intended to convert it when he took it into his custody.

[1] *R.* v. *Rowe*, Bell, C. C. 93. This case was decided on the question of the possession of the canal company, but it illustrates the principle as to finding also.

[2] *R.* v. *Glyde*, L. R. 1 C. C. R. 139.

[3] *R.* v. *Thurborn*, 1 Den. 387.

[4] *Preston's Case*, 2 Den. 251. The illustration does not represent the actual facts in *Preston's Case*, but a state of facts which the Court said might have existed, and upon which the jury might have convicted him, under the terms in which the very able judge who tried the case (the late M. D. Hill, Recorder of Birmingham) directed them.

[5] Per Rolfe, B., in *R.* v. *Peters*, 1 C. & K. 245; and see the summing up o Cockburn, C.J., in *R.* v. *Glyde*, L. R. 1 C. C. R. 140–1. In some of the cases on this subject a distinction is taken between property absolutely lost, and property only mislaid: see *R.* v. *West*, Dear. 402. It would appear, however, that the only real difference is that in the latter case the finder must know that the owner may be found. The distinction was useful as a step towards modifying the generality of the rule laid down by the old text writers: see e.g. 1 Hawkins, P. C. 142. "One who finds such goods as I have lost, and converts them to his own use, *animo furandi*, is no felon."

Illustrations.

(1.) [1] A, having a flock of lambs in a field, drives them out, and negligently drives away with them a lamb belonging to B which happened to be there. At the time of driving away the lamb A does not intend to convert it, but afterwards, on discovering what had happened, he sells the lamb and keeps the money. This is theft.

(2.) [2] A takes home B's umbrella from a club by mistake, and having afterwards found out that it is B's, converts it. A commits theft.

ARTICLE 304.

CONVERSION AFTER INNOCENT TAKING.

If a person innocently in any way not referred to in any of the preceding articles, has the possession of any chattel, and converts such chattel, he does not commit theft, although such chattel may have been entrusted to him by the owner, or may be the proceeds of something which was entrusted to him by the owner for the owner's benefit, or for the benefit of some person other than the person so entrusted, unless such conversion falls within the provisions of Chapter XLI. or Article 309.

Illustrations.

(1.) [3] A assigns his goods by deed to trustees for the benefit of his creditors. The trustees do not take possession, but leave A's possession undisturbed. A makes away with the goods, intending to deprive his creditors of them. This is not theft.

(2.) [4] B's house being on fire, A takes B's goods to A's house for protection, B acquiescing as to some of them. A's intention at the time is to keep them for B, but A afterwards changes his mind and converts them. This is not theft.

(3.) [5] B gives his broker A a cheque to buy Exchequer bills. A buys

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[1] *R.* v. *Riley*, Dear. 149

[2] Per Pollock, C.B., and Parke, B., in *Riley's Case*, p. 156; see the question of Martin, B., in *Preston's Case*, 2 Den. 359.

[3] *R.* v. *Pratt*, Dear. 360.

[4] *Leigh's Case*, 2 East, P. C. 694–5. This case seems to shew that if A were to find a bank note for £1000, which he knew to be B's, and were to take it up intending to give it to B, and were afterwards to be tempted to go to a gaming house, and were there to stake and lose it, he would not commit theft, and I believe that such is the law.

[5] *Walsh's Case*, 2 Lea. 1054. *Walsh's Case* was the occasion of the first of a series of statutes now represented by 24 & 25 Vict. c. 96, ss. 75, 79. See *post*, Chapter XLI.

Exchequer bills for B with part of the proceeds of the cheque and absconds with the rest. This is not theft.

(4.) [1] B, a boy unable to read, finds a cheque and gives it to A, asking A to tell him what it is. A, on various false pretences, withholds it from B in hopes of getting a reward from the owner. A has not stolen the cheque.

(5.) [2] A, the acting treasurer of a local Church Missionary Society, whose duty it is to deposit or invest the moneys received by him on account of the society, converts them. This is not theft.

(6.) [3] A is the treasurer of a money club, the nature of which is that certain persons deposit a weekly sum and are liable to fines in default. Loans might be made on interest to the members at A's discretion. The total amount, including interest on the loans, but subject to small deductions, to be divided amongst the members at the end of the year. A converts the balance in his hands at the end of the year. This is not theft.

Article 305.

OBTAINING BY FALSE PRETENCES NOT THEFT.

It is not theft to persuade any person by fraud to transfer the property of any chattel to any person; though such an act may be an offence under Chapter XL.

Article 306.

TEMPORARY TAKING IS NOT THEFT.

[4] It is not theft to deal with anything in any of the ways in which theft can be committed with the intention only to obtain the temporary use thereof, and not with the intention to convert it permanently to the use of some person other than the owner; but if a thing is so dealt with with the intention of totally depriving the owner of his property in it, the returning of the goods after a temporary use of them will not prevent the act from amounting to larceny.

[1] *R.* v. *Gardner*, L. & C. 243.

[2] *R.* v. *Garrett*, 8 Cox, C. C. 368, and 2 Russ. Cr. 247–8. This would not even now be an offence. As the offender had not to pay over or return the specific coins instrusted to him, he was not a bailee; and as there was no express trust of the money created by an instrument in writing he was not within the fraudulent trustee clauses of the Larceny Act.

[3] Nor is it any offence at all. *R.* v. *Harsall*, 1 L. & C. 58.

[4] See Illustrations, and for the latter part of the article note to *R.* v. *Phetheon*, 9 C. & P. 554, and *R.* v. *Trebilcock*, Dears. & B. C. C. 453.

Illustrations.

(1.) [1] A takes B's horse without B's leave, rides about on it to find some cattle, and then turns it loose on the common. This is not theft.

(2.) [2] A rides B's horse, without B's leave, to a place thirty miles off, and leaves him at an inn, saying he will call for him. A does not call for the horse but pursues his journey on foot. The jury must consider whether A meant permanently to deprive B of his horse, or only to make that particular journey on him. In the first case A's act is theft, in the second, not.

ARTICLE 307.

TAKING TAME ANIMAL WANDERING NOT THEFT.

[3] It seems that it is not theft to take and carry away an animal which, though really tame, is wandering at a distance from its habitation as if it were wild, and when it is not known to be tame by the person who takes and carries it away.

ARTICLE 308.

EVIDENCE AS TO THEFT.

The inference that property alleged to have been stolen has in fact been stolen may be drawn from other facts than the fact that it is identified by a witness.

The inference that an accused person has stolen property, or has received it knowing it to be stolen, may be drawn from the fact that it is found in his possession after being stolen, and that he gives no satisfactory account of the way in which it came into his possession.

Illustration.

[4] A is seen coming out of a lower room in a warehouse in the London Docks, in the floor above which a quantity of pepper is deposited, some

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[1] 1 Hale, P. C. 509.

[2] *R.* v. *Phillips*, 2 East, P. C. 662; *R.* v. *Addis*, 1 Cox, C. C. 78, is to the same effect.

[3] 1 Hawkins, P. C. p. 149, ch. 19, s. 40.

[4] *R.* v. *Burton*, Dear. 282. In this case Maule, J., characteristically remarked, "If a man go into the London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed."

As to the rule as to recent possession of stolen goods, many cases have been

being loose on the floor. A's pockets are full of pepper. On being stopped he throws down the pepper, and says, "I hope you will not be hard upon me." A may be convicted of stealing the pepper, although no pepper was missed from the warehouse and the pepper on A was not otherwise identified than by being shown to be similar to that in the warehouse.

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decided on the subject (see 2 Russ. Cr. 337–42), but they seem to me to come to nothing but this, that every case depends on its own circumstances, and that the nature of the thing stolen, the length of the interval between the theft and the possession, and the behaviour of the accused may all vary the force of the evidence indefinitely. The unexplained possession of a single stolen coin by a shopkeeper doing a large business in whose till it was found ten minutes after the theft, would prove nothing. The finding of a lost will ten years after its loss, locked up in the strong box of a careful person deeply interested in its temporary concealment, and peculiarly jealous of his strong box would prove a great deal. Between these extremes there may be infinite degrees in the weight of such evidence.

CHAPTER XXXVI.

EMBEZZLEMENT BY CLERKS AND SERVANTS.

ARTICLE 309.

EMBEZZLEMENT BY CLERKS AND SERVANTS—WHO ARE SERVANTS.

[1] WHEN a clerk or servant, or person employed in the capacity of a clerk or servant, commits theft by converting any chattel, money, or valuable security delivered to or received, or taken into possession by him for or in the name or on account[2] of his master or employer, his offence is called embezzlement.

Such a conversion is not a criminal offence (except in the cases hereinafter specially provided for) unless the person who converts stands to the owner of the property converted in the relation of a clerk or servant, or person employed in the capacity of a clerk or servant.

[3] It is a question for a jury whether a person accused of embezzlement is a clerk or servant or not.

[4] A clerk or servant is a person bound either by an express contract of service or by conduct[5] implying such a contract to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to transact.

A man may be a clerk or servant

[6] although he was appointed or elected to the employment in respect of which he is a clerk or servant by some other person than the master whose orders he is bound to obey;

[1] Founded on 24 & 25 Vict. c. 96, s. 68. See Art. 325 (*h*).

[2] For an instance in which money was received in the name of one person and on the account of another, see *R.* v. *Thorpe*, D. & B. 562.

[3] Bramwell, B., doubted as to this in *Walker's Case*, D. & B. 602; but see *R.* v. *Negus*, L. R. 2 C. C. R. 34; *R.* v. *Tite*, L. & C. 33; *R.* v. *May*, L. & C. 13.

[4] *R.* v. *Negus*, L. R. 2 C. C. R. 37 (judgment of Blackburn, J.), *R.* v. *Tite*, L. & C. 33.

[5] *R.* v. *Foulkes*, L. R. 2 C. C. R. 152.

[6] Illustration (1).

[1] although he is paid for his services by a commission or share in the profits of a business;

[2] although he is a member of any co-partnership, or is one of two or more beneficial owners of the [3] property embezzled;

[4] although he is the clerk or servant of more masters than one;

[5] although he acts as clerk or servant only occasionally, or only on the particular occasion on which his offence is committed.

[6] But an agent or other person who undertakes to transact business for another, without undertaking to obey his orders, is not necessarily a servant

because he receives a salary, or

because he has undertaken not to accept employment of a similar kind from any one else, or

because he is under a duty (statutory or otherwise) to account for money or other property received by him.

It seems that in order that a clerk or servant may be within the meaning of this article it is necessary that the objects of his service should not be criminal, but a man may be such a clerk or servant although the objects of his service are in part illegal as being contrary to public policy.

Illustrations.

(1.) [7] A, elected collector of rates by the vestry of a parish, and having to obey a committee of management, is the servant of the committee of management.

(2.) [8] A was cashier and collector to B at a salary of £150 a year, besides 12½ per cent. on the profits of the business. A was not to be responsible for losses and had no control over the management of the business. A was servant to B.

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[1] Illustrations (2) and (3).

[2] 31 & 32 Vict. c. 116, s. 1.

[3] "Money, goods, or effects, bills, notes, securities, or other property."

[4] Illustration (3).

[5] Illustration (4).

[6] Illustrations (6)—(9).

[7] *R.* v. *Callahan*, 8 C. & P. 154. See now 12 & 13 Vict. c. 103, s. 15, which applies also to assistant overseers, *R.* v. *Carpenter*, L. R. 2 C. C. R. 29; and see *R.* v. *Person*, 1 Moo. C. C. 434.

[8] *M'Donald's Case*, L. & C. 85.

(3.) [1] A took orders for B and collected money for him according to a journey book given to him by B, showing the sums to be received and the persons from whom they were due. A was paid by a commission. A was clerk to B, though he was principally employed by C, D, and others.

(4.) [2] A was employed by B to go on messages when A had nothing else to do, and B was to give A whatever B chose. A was B's servant.

(5.) [3] A, a drover, was employed by B, a farmer, on one single occasion to drive a cow and calf to a person to whom they were sold, and to bring back the money. A was B's servant.

(6.) [4] A, the master of a charity school, on one particular occasion consents to get a subscription to the funds of the school, at the request of the treasurer of the committee of management by which A was appointed, and which managed the school. It was no part of A's duty as master to collect any subscriptions. In getting the subscription A was not the servant of B.

(7.) [5] A, a drover, is employed by B, a grazier, to drive oxen to London, to sell them on the road, if possible, and to take those remaining unsold to a salesman in Smithfield. A is not B's servant.

(8.) [6] B engaged A, who kept a refreshment house at Birkenhead, to get orders for manure manufactured by B. A was not bound to give any definite amount of time or labour to the purpose. The manure was sent to stores under A's control, and of which he was tenant, though B paid the rent, and was forwarded by A to the customers. A was paid £1 a year salary and a commission. A was B's agent, not his servant.

(9.) [7] A was engaged by B to solicit orders. He was to be paid by commission. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other person than B. A was not B's servant.

(10.) [8] The treasurer of a friendly society under 18 & 19 Vict. c. 63, is

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[1] *R.* v. *Carr*, R. & R. 198. A doubt was expressed as to this last point referred to in this illustration in *R.* v. *Goodbody*, 8 C. & P. 665; but *R.* v. *Batty*, 2 Moo. C. C. 257, and *R.* v. *Tite*, L. & C. 29, uphold *R.* v. *Carr* and recognize the principle that a man may be servant to several persons at once.

[2] *R.* v. *Spencer*, R. & R. 299.

[3] *R.* v. *Hughes*, Moo. C. C. 370.

[4] *R.* v. *Nettleton*, 1 Moo. C. C. 259.

[5] *R.* v. *Goodbody*, 8 C. & P. 665. The difference between this case and *R.* v. *Hughes* in Illustration (5) lies in the power of sale.

[6] *R.* v. *Walker*, D. & B. 600.

[7] *R.* v. *Negus*, L. R. 2 C. C. R. 34.

[8] *R.* v. *Tyree*, L. R. 1 C. C. R. 177. A treasurer would appear, as a rule, to be rather a banker than a servant, but every case depends on its special circumstances. In *R.* v. *Murphy*, 4 Cox, C. C. 101, the prisoner was both clerk and treasurer (see the explanation of this case given in *R.* v. *Tyree*). In *R.* v. *Welch* (1 Den. 199), the circumstances were very similar to those of *R.* v. *Tyree*, and Coleridge, J., appears to have been satisfied that the prisoner was a servant, and did not reserve the point. It is singular that this case is not referred to in *R.* v. *Tyree*.

not the servant of the trustees of the society, though by sect. 22 he is bound before seven days after being required by the trustees (in whom the money is vested by sect. 18) to account to the trustees.

(11.) [1] A parish clerk is not a servant, because he is not under the orders of any particular person.

(12.) [2] The chamberlain of the commons of a corporation chosen and sworn in at a court, but whose duty it is to superintend the commons, and to receive certain duties, which he kept till the end of the year, when his accounts were audited and the balance paid over to his successor, is not a servant, because he holds a distinct office, and is not bound to pay at any time.

(13.) [3] The servant of a trade union may be convicted of the embezzlement of its funds, although some of its rules are void as being in restraint of trade.

(14.) [4] The servant of a society, the members of which took an unlawful oath under 37 Geo. 3, c. 123, and 52 Geo. 3, c. 104, cannot be convicted of embezzlement for misappropriating the funds of the society.

Article 310.

The property embezzled must be the master's.

The offence of embezzlement cannot be committed by the appropriation of property which does not belong to the master of the alleged offender, although such property may have been obtained by such alleged offender by the improper use of the property entrusted to him by his master, but property which does belong to the master of the offender may be embezzled, although the offender received it in an irregular way.

Illustrations.

(1.) [5] B, the high bailiff of a county court, appointed A a bailiff. By rules of practice it was A's duty to pay over moneys levied by him to the

[1] *R.* v. *Burton*, M. C. C. R. 237, explained in *Williams* v. *Stott*, 3 Tyrw. 688; 1 Car. & M. 675.

[2] *Williams* v. *Stott*, 3 Tyrw. 688; 1 Cr. & M. 675.

[3] *R.* v. *Stainer*, L. R. 1 C. C. R. 230. In the argument on this case both sides assumed that if the society was criminal the conviction could not be sustained. Cockburn, C.J., said, "It is unnecessary to consider how far the criminal purpose of a society might affect its title to property." As stolen property may be stolen from the thief who stole it (1 Hale, P. C. 507), the question might deserve consideration if it ever arose. *R.* v. *Hunt*, in the next illustration, is in point, yet it is only a *nisi prius* decision.

[4] *R.* v. *Hunt*, 8 C. & P. 642, by Mirehouse (Com. Serj.), after consulting Bosanquet and Coleridge, JJ.

[5] *R.* v. *Glover*, L. & C. 466.

registrar. A received certain money and appropriated it, the money being the money of the registrar and not B's, whose servant (if any one's) A was. This was not embezzlement.

(2.) [1] A railway company contracted with B to deliver the railway's coals in the railway's carts, B finding horses and carmen, but the terms of the contract were such as to make the carmen, after receiving the money, answerable to the railway. A, a carman, received money for coals and appropriated it. This was not embezzlement, as the money was not the money of B, but of the railway company.

(3.) [2] A, a bargeman, was forbidden by B, his master, to take a cargo on his barge on part of a particular voyage. A took the cargo, appropriated the freight to himself, and denied the receipt of it when questioned by his master. The person from whom he took the cargo and freight knew of no one in the transaction except A. This was not embezzlement, as the freight did not belong to B.

(4.) [3] A, entrusted with a cheque for B, gets it cashed by a friend, and not, as was the regular course, at a bank, and appropriates the proceeds. This is embezzlement.

ARTICLE 311.

DISTINCTION BETWEEN EMBEZZLEMENT AND OTHER KINDS OF THEFT.

The distinction between embezzlement by a clerk or servant and other kinds of theft is, that in other kinds of theft the property stolen is taken out of the possession of the owner, whereas, in embezzlement by a clerk or servant, the property embezzled is converted by the offender whilst it is in the offender's possession on account of his master and before that possession has been changed into a mere custody.

Illustrations.

(1.) [4] A, B's servant, has authority to take orders, but none to send out goods from B's shop. A takes an order for pickles and treacle, enters in his master's book an order for pickles only, takes from the shop and

[1] *R.* v. *Beaumont*, Dear. 270. The circumstances of this case are at first sight identical with those of *R.* v. *Thorpe*, D. & B. 362, in which the conviction was affirmed; but the special terms of the contract, I suppose, make the difference. It is singular that *R.* v. *Beaumont* is not referred to in *R.* v. *Thorpe*, otherwise than in a note by the reporter at the end of the case.

[2] *R.* v. *Cullum*, L. R. 2 C. C. R. 28.

[3] *R.* v. *Gale*, 46 L. J. (M. C.) 134.

[4] *R.* v. *Wilson*, 9 C. & P. 27. The prisoner, having been indicted for embezzlement, escaped.

delivers to the customer both pickles and treacle, and keeps the price of the treacle. This is a theft of the treacle, as A had no authority to deliver it, but it is not an embezzlement of the price, as it was not received on B's account, but in fraud.

(2.) [1] A, a clerk to a navy tailor, goes on board a man-of-war with clothes delivered to him by his master to sell to the marine artillerymen on board. He afterwards enters as a seaman on another ship, carrying off the clothes. A commits theft, and not embezzlement.

(3.) [2] A, the manager of a branch bank, has in his office a safe, the property of the bank, and of which the bank manager keeps a key at the head office. A's duty is to put money received during the day into this safe. He takes part of it out of the safe and applies it to his own purposes. This is theft, and not embezzlement.

(4.) [3] A's duty is to get bills accepted and discounted for his master. A having got a bill accepted for his master, lays it with other bills on his master's desk. He then takes it from his master's desk, gets it cashed, and appropriates the money. This is theft.

(5.) [4] A receives from his master, B, dock warrants enabling him to get property from the docks, and is induced by B to carry the property to London. A on the road appropriates part of the property. This is theft.

(6.) [5] A, B's servant, is sent by B to fetch 240 quarters of oats, which B has purchased, and which are lying on a vessel in the Thames. Whilst the oats are being measured into B's barge, A causes five quarters to be put up in sacks and set aside, the rest being loose. A then sells the sacks of oats for his own benefit from the vessel, and before they were put into the barge.[6] This is theft.

(7.) [7] A, B's servant, gets plate for his master from a silversmith, puts it in B's plate chest, and then takes it out and appropriates it. This is theft. [[8] If he appropriates it before he puts it into the plate chest, he commits embezzlement.]

(8.) [9] A, B's servant, receives from C, a fellow servant, £3 of B's money, and appropriates 10*s.* to his own use. This is not embezzlement [but is theft.]

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[1] *R.* v. *Hawkins*, 1 Den. C. C. 584.

[2] *R.* v. *Wright*, D. & B. 431.

[3] *Chipchase's Case*, 2 Lea. 699.

[4] *R.* v. *Norval*, 1 Cox, C. C. 95; 2 Russ. Cr. 388.

[5] *Abraham's Case*, 2 East, P. C. 569.

[6] 2 Russ. Cr. 387.

[7] Per Coleridge, J., in *R.* v. *Watts*, 7 Den. 14.

[8] A dictum of Wilde, C.J., in *R.* v. *Watts* seems to say the opposite, but if this were so, the whole distinction between embezzlement and theft would be taken away (as no doubt it ought to be as a matter of common sense). See Mr. Greaves' remarks on Wilde, C.J.'s. dictum and on the whole case of *R.* v. *Watts*, 2 Russ. Cr. 399, notes (b) and (c).

[9] *R.* v. *Murray*, 2 Russ. Cr. (5th Ed.) 314; 5 C. & P. 145; 1 Moody, 276.

(9.) [1] A, a banker's clerk, whose business it is to receive notes over the counter and put them in a drawer, receives a note for £100 from the servant of a customer, and appropriates it to himself without putting it into the drawer. This is not theft at common law, but is embezzlement.

ARTICLE 312.

EVIDENCE AS TO EMBEZZLEMENT.

[2] The inference that a prisoner has embezzled property by fraudulently converting it to his own use, may be drawn from the fact that he has not paid the money or delivered the property in due course to the owner, or

from the fact that he has not accounted for the money or other property which he has received, or

from the fact that he has falsely accounted for it, or

from the fact that he has absconded, or

[3] from the fact that upon the examination of his accounts there appeared a general deficiency unaccounted for;

[4] but none of these facts constitutes in itself the offence of embezzlement, nor is the fact that the alleged offender rendered a correct account of the money or other property entrusted to him inconsistent with his having [5] embezzled it.

[1] *Bazeley's Case*, 2 Lea. 835; 2 East, P. C. 571. This case occasioned the passing of the 39 Geo. 3, c. 85, now re-enacted in substance by 24 & 25 Vict. c. 96, s. 68.

[2] These facts are the common evidence of embezzlement given in every instance, and require no illustration. That the non-payment is only by way of delay, the false accounting a mistake, &c., are common topics of defence.

[3] *R.* v. *Grove*, 1 Moody, 447; 2 Russ. Cr. 459–60. The authority of this case, decided by eight judges to seven, has been doubted. See *R.* v. *Moah*, Dear. 626, 639; see, too, *R.* v. *Lambert*, 2 Cox, C. C. 309; *R.* v. *Lloyd Jones*, 8 C. & P. 288; *R.* v. *Chapman*, 1 C. & K. 119; *R.* v. *King*, 12 Cox, C. C. 73.

[4] *R.* v. *Hodgson*, 3 C. & P. 422; *R.* v. *Winnall*, 5 Cox, C. C. 326. Mr. Greaves' note on this case disapproves of the summing-up of Erle, J., on what appears to me to be a misconception of its purport. Mr. Greaves' view that the fraudulent conversion constitutes the offence, and that everything else is only evidence of it is obviously correct; but I think that Erle, J., did not mean to say anything inconsistent with this. Wilful false accounting is now a substantive offence. See 38 & 39 Vict. c. 24, s. 2, and Article 352, *post*.

[5] *R.* v. *Guelder*, Bell, C. C. 28; *R.* v. *Lister*, D. & B. 118.

CHAPTER XXXVII.

ROBBERY AND EXTORTION BY THREATS.

[1] ARTICLE 313.

ROBBERY.

EVERY one is guilty of felony and is liable upon conviction thereof, as a maximum punishment, to be kept in penal servitude in the case of the offences defined in clauses (*a.*) and (*b.*) for life, in the case of the offence defined in clause (*c.*) for fourteen years, and in the case of the offence defined in clause (*d.*) for five years, who does any of the following things (that is to say),

(*a.*) [2] who, being armed with any offensive weapon or instrument, robs any person, or

being together with any person or persons, robs or assaults with intent to rob any person, or

(*b.*) [2] who robs any person, and at the time of, or immediately before, or immediately after such robbery, wounds, beats, strikes, or uses any other personal violence to any person, or

(*c.*) [3] who robs any person, or

(*d.*) [4] who assaults any person with intent to rob.

ARTICLE 314.

EXTORTION BY THREATS.

Every one commits felony and is liable upon conviction thereof to a maximum punishment of penal servitude for life

[1] For definition of robbery, and illustrations as to the nature of the fear and violence involved, see Article 241.

[2] 24 & 25 Vict. c. 96, s. 43. Offenders against this section are liable, if males, to be thrice privately whipped in addition to the other punishments above specified. 26 & 27 Vict. c. 44, s. 1. As to the manner of inflicting this punishment, see Article 12 (*d*), *ante*.

[3] 24 & 25 Vict. c. 96, s. 405.

[4] Ibid. s. 42, S.

in cases *a* i., *a* ii., *b* and *c*, for ten years in case *a* iii., and five years in case *d*, who

(*a*.) sends, delivers, utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing

(i.) [1] demanding any valuable thing of any person with menaces, and without any reasonable and probable cause.

(ii.) [2] Accusing, or threatening to accuse, any other person of any crime punishable by law with death or penal servitude for not less than [3] seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any [4] infamous crime, with a view or intent to extort or gain any valuable thing from any person, by means of such letter or writing.

(iii.) [5] Threatening to burn or destroy any house, barn, or other building, or any grain, hay, or straw, or other agricultural produce in a rick or stack, or in or under any building, or any ship, or vessel, or to kill, maim, or wound any cattle; or

(*b*.) [6] who accuses, or threatens to accuse, any person whatever of any of the crimes specified in *a*. ii., with the view or intent to extort or gain any valuable thing from any person whatever, or

(*c*.) [7] who, with intent to defraud or injure any other person, compels or induces any person to deal with any valuable security in any of the manners mentioned in note 8,[8]

[1] 24 & 25 Vict. c. 96, s. 44, S. W.

[2] Ibid. c. 96, s. 46, S. W.

[3] This must mean penal servitude for seven years or more. There is no crime for which penal servitude for seven years is a minimum punishment.

[4] i.e. buggery, committed either with mankind or beast, every assault with intent to commit the same, every attempt or endeavour to commit the same, every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the same (Ibid. c. 96, s. 46).

[5] 24 & 25 Vict. c. 97, s. 50, S. W.

[6] 24 & 25 Vict. c. 96, s. 47, W. An intent to compel a person by threats to buy a mare is within this section. *R.* v. *Redman*, L. R. 1 C. C. R. 12.

[7] Ibid. s. 48, S.

[8] "Execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used, or dealt with as a valuable security."

by any unlawful violence to, or restraint of the person of another, or by any threat of such violence or restraint, or

by accusing, or threatening to accuse, any person of treason or felony, or any such crime as is mentioned in clause *a.* ii.; or

(*d.*) [1] who, with menaces or force, demands any valuable thing of any person with intent to steal the same ([2]whether the thing demanded is received or not.)

[3] It is immaterial whether the menaces or threats mentioned in clauses *a.* i., *a.* ii., *b.*, *c.*, and *d.* be of violence, injury, or accusation to be caused or made by the offender or by any other person.

The expression "valuable thing" in this article means any property, chattel, money, valuable security, or other valuable thing.

[1] 24 & 25 Vict. c. 96, s. 45, S. *R.* v. *Ogden* (L. & C. 288) shews what sort of menaces fall within this section. A obtained five shillings from B by pretending to be a bailiff, and threatening to distrain. It was held that his guilt depended on the question whether or not he made the threat in such a way as to "unsettle B's mind, and take away from his acts that element of free, voluntary action which alone constitutes consent."

[2] *R.* v. *Robertson*, L. & C. 483. In that case it was held that a policeman who said he would lock a man up for speaking to a prostitute unless he received five shillings used a "menace," notwithstanding his having no power to do so.

[3] 24 & 25 Vict. c. 96, s. 49. There is no similar section in the Act relating to offences against the person (see Article 234 (*a*)), or in the Act relating to malicious injuries to property, from which *a* ii. and *a* iii. are taken. I think, however, both on authority and on principle, that those clauses would be construed as if there were. The language of the sections on which this article is founded has been condensed and rearranged, but it will be found on examination that the article accurately represents the seven sections which it embodies.

CHAPTER XXXVIII.

BURGLARY, HOUSEBREAKING, ETC.

ARTICLE 315.

DEFINITIONS.

IN this chapter the following words are used in the following senses:—

[1] Night means the interval between nine of the clock at night and six of the clock in the morning.

House means a permanent building in which the owner, or the tenant, or any member of the family habitually sleeps at night.

[2] If a building is so constructed as to consist of several parts, having no internal communication between each other, and if these parts are occupied and habitually slept in by different tenants, they may constitute separate dwelling houses.

[3] A building occupied with and within the same curtilage with any dwelling-house, is deemed to be part of the said dwelling-house if there is between such building and dwelling-house a communication either immediate or by means of a covered and inclosed passage leading from the one to the other, but not otherwise.

The word "break" means

(*a.*) the breaking of any part, internal or external, of the

[1] 24 & 25 Vict. c. 96, s. 1. It may be worth while to observe that the expression "nine of the clock," "six of the clock," indicate mean as opposed to solar time, but a question might arise as to whether they mean local mean time or the mean time commonly observed at any given place. London time, or, as it is called, railway time, is now very generally observed, and there is a difference of more than twenty minutes between London and Cornwall. Local mean time is the natural meaning.

[2] The cases and authorities on this subject are collected in Archbold, 518–520, but there is so little principle in the matter, and each case depends so much on its peculiar circumstances, that I have not thought it advisable to give illustrations.

[3] 24 & 25 Vict. c. 96, s. 53.

building itself, or the opening by any means whatever (including lifting, in the case of things kept in their places by their own weight) of any door, window, shutter, cellar flap, or other thing intended to cover openings to the house, or to give passage from one part of it to another, and getting down the chimney;

(*b.*) obtaining an entrance into the house by any threat or artifice used for that purpose, or by collusion with any person in the house.

The word "enter" means the entrance into the house of any part of the offender's body, or of any instrument held in his hand for the purpose of intimidating any person in the house, or of removing any goods, but does not include the entrance of part of an instrument used to break the house open.

Illustration.

[1] A opens a sash window, puts a crowbar under a shutter three inches inside the window, and tries to break open the shutter, but was not within the sash window. Here there is a breaking, but no entry.

Article 316.

SACRILEGE—BURGLARY.

Every one commits felony, and is liable upon conviction thereof to penal servitude for life as a maximum punishment, who

(*a.*) [2] breaks and enters any church, chapel, meeting-house, or other place of divine worship, and commits any felony therein; or

(*b.*) [3] breaks and enters any dwelling-house by night with intent to commit a felony therein. The offence in this case is called burglary.

Article 317.

HOUSEBREAKING AND COMMISSION OF FELONY.

[4] Every one commits felony and is liable, upon conviction

[1] *R.* v. *Rust*, 1 Moo. 183; and see *R.* v. *Roberts*, 2 East, P. C. 487.

[2] 24 & 25 Vict. c. 96, s. 50, S.

[3] Ibid. s. 52, S. for punishment; 2 Russ. Cr. 2 (5th Ed.), for definition.

[4] Ibid. ss. 55, S. and 56, S.

thereof, to a maximum punishment of fourteen years penal servitude, who breaks and enters and commits any felony in any dwelling-house, or any building being within the curtilage of a dwelling-house and occupied therewith (but not being part thereof within Article 315), or any schoolhouse, shop, warehouse, or counting-house,

Article 318.

ENTERING DWELLING-HOUSE WITH INTENT.

[1] Every one commits felony, and is liable upon conviction thereof to seven years penal servitude as a maximum punishment, who breaks and enters any of the buildings mentioned in Articles 316 or 317, or who by night enters any dwelling-house with intent in either case to commit felony therein.

Article 319.

BREAKING OUT AFTER COMMITTING FELONY.

[2] Every one who, being in any of the buildings mentioned in Articles 316 or 317, commits a felony therein, and breaks out of the same, commits felony, and is liable to the same punishment as if he had broken in and committed felony therein. If such building is a dwelling-house, and the offence is committed at night, the offender commits burglary.

Every one who enters any dwelling-house with intent to commit a felony therein, and breaks out of the same by night, is guilty of burglary.

Article 320.

BEING FOUND IN POSSESSION OF HOUSEBREAKING INSTRUMENTS.

[3] Every one commits a misdemeanor, and is liable for the first offence to a maximum punishment of five, or if he has been previously convicted of felony or of such misdemeanor, of ten, years penal servitude;

[1] 24 & 25 Vict. c. 96, ss. 54, S. and 57, S.
[2] Ibid. ss. 50, 51, 55, 56, S. These sections are re-arranged.
[3] Ibid. ss. 58 and 59.

[1] who is found by night armed with any dangerous or offensive weapon or instrument whatever with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein;

or is found by night having in his possession, without lawful excuse (the proof of which excuse lies upon him), any picklock key,[7] crow, jack, bit, or other instrument of housebreaking;

or is found by night having his face blackened or otherwise disguised with intent to commit any felony;

or is found by night in any dwelling-house or other building whatsoever, with intent to commit any felony therein.

[1] A common key may be such an instrument. *R.* v. *Oldham*, 2 Den. 472. Maule and Cresswell, JJ., were both of opinion that there should be a comma between "picklock" and "key." *R.* v. *Oldham*, however, makes this unimportant.

CHAPTER XXXIX.

PUNISHMENTS FOR STEALING PARTICULAR THINGS AND RECEIVING GOODS UNLAWFULLY OBTAINED.

ARTICLE 321.

PUNISHMENT FOR STEALING THINGS FOR WHICH NO SPECIAL PUNISHMENT IS PROVIDED.

[1] EVERY one commits felony and is liable upon conviction thereof to a maximum punishment of five years penal servitude who steals anything capable of being stolen, and for the stealing of which no specific punishment is hereinafter provided.

[2] If the conviction takes place after a previous conviction for felony, either upon an indictment or under 8 & 9 Vict. c. 126, the maximum punishment is increased to ten years penal servitude.

If the conviction takes place after a previous conviction for any misdemeanor indictable under 24 & 25 Vict. c. 96, or

If the conviction takes place after two summary convictions under 24 & 25 Vict. c. 96, or 24 & 25 Vict. c. 97, or any Act mentioned in the footnote hereto,

the maximum punishment is increased to seven years penal servitude.

ARTICLE 322.

KILLING ANIMALS WITH INTENT TO STEAL EQUIVALENT TO STEALING.

[3] Every one who wilfully kills any animal with intent to steal the carcase, skin, or any part of the animal so killed, commits felony, and is liable upon conviction thereof to the

[1] 24 & 25 Vict. c. 96, s. 4, S. W. Thefts falling under this Article appear to be the "simple larceny" referred to in 24 & 25 Vict. c. 96, ss. 33 and 36 (Article 328 (*n*) and (*k*)). Hale means by "simple larceny" larceny without violence.

[2] 24 & 25 Vict. c. 96, ss. 7, 8, 9, S. W. The statutes are 7 & 8 Geo. 4, cc. 29, 30; 9 Geo. 4, cc. 55, 56; 10 & 11 Vict. c. 82; 11 & 12 Vict. c. 59; 14 & 15 Vict. c. 92. These are earlier Acts on the same subjects as the two Consolidation Acts.

[3] 24 & 25 Vict. c. 96, s. 11.

same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed is felony.

Article 323.

STEALING AND CONCEALING VALUABLE SECURITIES.

[1] Every one who steals, or for any fraudulent purpose destroys, cancels, or obliterates the whole or any part of any [2] valuable security, other than a document of title to land, commits felony of the same nature and in the same degree, and punishable in the same manner as if he had stolen any chattel of the like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security.

Provided that no person who commits any offence against this article or clause (*a*) of the next succeeding article, is liable to be convicted of any such offence by any evidence whatever in respect of any act done by him, if, previously to being charged with such offence, he first discloses such act on oath in consequence of any compulsory process of any Court which, on the 6th of May, 1861, was a court of law or equity, in any action, suit, or proceeding *bonâ fide* instituted by any party aggrieved, or if he first discloses the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency.

[1] 24 & 25 Vict. c. 96, s. 27. This would probably involve S. W.

[2] Sect. 1. "Valuable security," includes any order, Exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and also includes any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money, or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as defined in Article 327, note 3.

ARTICLE 324.

THEFTS PUNISHABLE WITH PENAL SERVITUDE FOR LIFE.

Every one commits felony and is liable upon conviction thereof to penal servitude for life as a maximum punishment, and in respect of the offences defined in clause *b*, to a maximum alternative term of imprisonment with hard labour for four years, who does any of the following things (that is to say):

(*a*.) [1] who, either during the life of the testator, or after his death, steals, or for any fraudulent purpose destroys, cancels, obliterates, or conceals the whole or any part of any will, codicil, or other testamentary instrument, whether it relates to real or personal estate, or to both;

(*b*.) [2] or who steals a post letter-bag, or a [3] post letter from a post letter-bag, or from a post office, or from an office of the post office, or from a mail;

or any chattel, money, or valuable security, from or out of a post letter;

[1] 24 & 25 Vict. c. 96, s. 29, S.

[2] 7 Will. 4 & 1 Vict. c. 36, ss. 27, 28, for punishments, ss. 41, 42 (S.), and for definitions, s. 47.

[3] "Post letter" means any letter or packet transmitted by the post under the authority of the Postmaster-General from the time of its being delivered to a post office letter-carrier, or other person authorized to receive letters, to the time of its being delivered to the person to whom it is addressed, or to his house or office, or to his servant or agent, or other person considered to be authorized to receive the letter, according to the usual manner of delivering that person's letters. A letter not posted in the proper course, but put amongst the letters so posted for a sorter to sort is not a post letter. *R.* v. *Shepherd*, Dear. 606.

"Post letter-bag," includes a mail bag, or box, or package or parcel or other envelope or covering in which post letters are conveyed, whether it contains post letters or not.

"Mail" includes every conveyance by which post letters are carried, every person or horse employed in conveying or delivering post letters, every vessel employed by or under the post-office or the Admiralty for the transmission of post letters, or not regularly so employed but under contract for the conveyance of post letters, and every ship of war or vessel in the service of Her Majesty so employed.

"Valuable security" is defined in sect. 47 in nearly the same terms as in sect. 1 of the Larceny Act: see above. The only difference of much importance is that the definition in the Post Office Act includes any warrant or order for the delivery or transfer of any goods or valuable thing (s. 47).

or who stops a mail with intent to rob or search the same;

(*c.*) [1] or who secretes, embezzles, or runs away with any of the things mentioned below,[2] or any part of any such thing, being an officer or servant of the governor and company of the Bank of England, or of the Bank of Ireland, and being intrusted with any such thing lodged or deposited with the said governor and company,[3] or with him as an officer or servant of the said governor and company.

Article 325.

THEFTS PUNISHABLE WITH PENAL SERVITUDE FOR FOURTEEN YEARS.

Every one commits felony, and is liable, upon conviction thereof, to a maximum punishment of fourteen years penal servitude, who does any of the following things (that is to say):

(*a.*) [4] who steals any horse, mare, gelding, colt, filly, bull, cow, ox, heifer, calf, ram, ewe, sheep, or lamb, or wilfully kills any such animal with intent to steal the carcase, skin, or any part thereof; or

(*b.*) [5] who steals any chattel, money, or valuable security from the person of another; or

(*c.*) [6] who steals in any dwelling-house any chattel, money, or valuable security, if the value of the property stolen is in the whole £5 or more, or if the offender puts any one, being in such dwelling-house, in bodily fear by any menace or threat; or

(*d.*) [7] who steals to the value of ten shillings any of the

[1] 24 & 25 Vict. c. 96, s. 73, S.

[2] Any bond, deed, note, bill, dividend warrant, or warrant for the payment of any annuity, or interest, or money, or any security, money, or other effects of any other person, or body politic or corporate.

[3] This must mean "either of the said governors and companies."

[4] 24 & 25 Vict. c. 96, ss. 10, S., 11.

[5] Ibid. s. 40, S.

[6] Ibid. ss. 60, 61, S.

[7] Ibid. s. 62, S.

[1] goods mentioned below, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place; or

(*e.*) [2] who steals any goods or merchandise in any vessel, barge, or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal; or

(*f.*) [2] who steals any goods or merchandise from any dock, wharf, or quay, adjacent to any such haven, port, river, canal, creek, or basin, as is mentioned in the last clause; or

(*g.*) [3] who [4] plunders or steals any part of any ship or vessel in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to any such ship or vessel; or

(*h.*) [5] who, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, steals any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, or fraudulently embezzles any chattel, money, or valuable security delivered to or received and taken into possession by the offender for or in the name or on the account of his master or employer; or

(*i.*) [6] who, being employed in the public service of Her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, steals, embezzles, or in any manner fraudulently applies for his own benefit, or for any purpose except the public service, the whole or any part of any chattel, money, or valuable security belonging to or in the possession or power of Her Majesty, or intrusted to the offender or

[1] Any woollen, linen, hempen, or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca, or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material.

[2] 24 & 25 Vict. c. 96, s. 63, S.

[3] Ibid. s. 64, S.

[4] I do not know that this word has any special legal signification.

[5] 24 & 25 Vict. c. 96, ss. 67, 68, S. W.

[6] Ibid. ss. 69, S., 70.

received or taken into possession by him in virtue of his employment.

Article 326.

THEFTS PUNISHABLE WITH PENAL SERVITUDE FOR SEVEN YEARS.

[1]Every one commits felony, and is liable upon conviction thereof to seven years penal servitude, as a maximum punishment, who steals any chattel or fixture of the value of more than £5, let to be used by him or her in or with any house or lodging, whether the contract was entered into by the offender or his wife, or her husband, or by any person on his or her, or on her husband's, behalf.

If the value of the thing stolen do not exceed £5, the offender is liable to a maximum punishment of two years' imprisonment and hard labour.

Article 327.

THEFTS PUNISHABLE WITH PENAL SERVITUDE FOR FIVE YEARS.

Every one commits felony, and is liable upon conviction thereof to a maximum punishment of five years penal servitude, who does any of the following things (that is to say):

(*a.*) [2]who steals or for any fraudulent purpose destroys, cancels, obliterates, or conceals the whole or any part of any[3] document of title to lands; or

(*b.*) [4]who steals or for any fraudulent purpose takes from its place of deposit for the time being, or from any person having the lawful custody thereof,[5] or unlawfully and maliciously cancels, obliterates, injures, or destroys the whole or

[1] 24 & 25 Vict. c. 96, s. 74, S. W.

[2] Ibid. s. 28.

[3] The term "document of title to lands" includes any deed, map, paper, or parchment written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate (24 & 25 Vict. c. 96, s. 1).

[4] 24 & 25 Vict. c. 96, s. 30, S.

[5] Taking a warrant of execution from a county court bailiff, under the impression that his authority depends on its possession, is "a taking for a fraudulent purpose," but is not stealing under this section: *R.* v. *Bailey*, L. R. 1 C. C. R. 347.

any part of any of the judicial or official documents mentioned below;[1] or

(*c.*) [2] who steals, rips, cuts, severs, or breaks, with intent to steal, any glass or woodwork belonging to any building whatsoever, or any[3] metal, or any utensil or fixture of whatever material, fixed in or to any building whatsoever, or

anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or

in any square or street, or in any place dedicated to public use or ornament, or

in any burial ground; or

(*d.*) [4] who steals, or severs with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke or black lead, or any coal or cannel coal from any mine, bed, or vein thereof respectively; or

(*e.*) [5] who steals, or cuts, breaks, roots up, or otherwise destroys or damages with intent to steal the whole or any part of any tree, sapling, or shrub, or any underwood, if the value of the article or articles stolen, or the amount of the

[1] Any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney. Any original document whatsoever belonging to any Court of record, or relating to any matter civil or criminal begun depending, or terminated in any such Court. Any bill, petition, answer, interrogatory, deposition, affidavit, order or decree, or any original document whatsoever of or belonging to any Court of Equity, or relating to any cause or matter begun, depending, or terminated in any such Court. Any original document in anywise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any Court of Justice, or in any of Her Majesty's castles, palaces or houses, or in any government or public office.

[2] 24 & 25 Vict. c. 96, s. 31, S. W. as in case of simple larceny. The words "burial-ground" were added to do away with a doubt expressed by Baron Bramwell (*R.* v. *Jones*, D. & B. 558) as to whether a churchyard was a "public place" within 7 & 8 Geo. 4, c. 29, s. 44. The other judges did not share this doubt. The present enactment does not absolutely remove it, as there are many churchyards which are not burial-grounds. However, the case of *R.* v. *Jones* distinctly decided the point.

[3] "Lead, iron, copper, brass, or other metal."

[4] 24 & 25 Vict. c. 96, s. 38, S.

[5] Ibid. s. 32, S. W. The section is re-arranged for the sake of brevity, and the word "grow" substituted for "grows" to meet the grammar. The change also represents the sense, for it has been held that in estimating the damage done the value of several trees injured at the same time may be put together: *R.* v. *Shepherd*, L. R. 1 C. C. R. 118.

injury done exceeds £5, or exceeds the value of £1, if the article or articles stolen or damaged grow in any park, pleasure ground, garden, orchard, or avenue, or in ground adjoining or belonging to any dwelling-house; or

(*f.*) [1]who steals any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out and known as such.

[2]Every one who commits any of the offences specified in clauses (*c*) (*e*) or (*g*), after being previously convicted of any misdemeanor indictable under 24 & 25 Vict. c. 96, or after two previous summary convictions under 24 & 25 Vict. c. 96, or c. 97, or any Act mentioned in note (2) to Article 321, is liable to a maximum punishment of seven years penal servitude.

Article 328.

SUNDRY OFFENCES RESEMBLING THEFT—PUNISHED BY VARIOUS TERMS OF IMPRISONMENT, ETC.

Every one who does any of the following things is liable to the consequences stated in the schedule in the note hereto, as a maximum punishment (that is to say):

(*a.*) [3]who steals any dog; or

SCHEDULE

24 & 25 Vict. c. 96, Clauses.	Maximum punishment and other consequences.	How inflicted.
a. Sect. 18.	*First offence.* Six months imprisonment with hard labour, or £20 fine, besides value of dog.	Conviction before two justices.
	Second offence. Misdemeanor. Eighteen months imprisonment and hard labour.	Indictment.

[1] 24 & 25 Vict. c. 39, s. 26, S.

[2] 24 & 25 Vict. c. 96, s. 8, S.W., makes this provision as to all offences punishable under the Act as simple larceny. The offences in question are created by ss. 26, 31, 32, 33, 36. The case of a conviction of one of these offences after a previous conviction for felony is provided for, I suppose, by 7 & 8 Geo. 4, c. 28, s. 11. See Article 19, *ante*.

[3] 24 & 25 Vict. c. 96, s. 18.

(*b.*) [1] who unlawfully has in his possession, or on his premises, any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen, or such skin to be the skin of a stolen dog; or

(*c.*) [2] who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any stolen dog, or any dog in the possession of any person not its owner; or

(*d.*) [3] who steals, or wilfully kills with intent to steal the same, or any part thereof, any bird, beast, or other animal ordinarily kept in a state of confinement, or for any domestic purpose, not being the subject of larceny at common law; or

(*e.*) [4] who has in his possession, or on his premises any such bird, or the plumage thereof, any such animal or the skin, or any part thereof, as is mentioned in the last clause,

SCHEDULE.

24 & 25 Vict. c. 96, Clauses.	Maximum punishment and other consequences.	How inflicted.
b. Sect. 19.	*First offence.* £20 fine.	Conviction before two justices.
	Second offence. Same as second offence (*a*).	Indictment.
c. Sect. 20.	Misdemeanor. Eighteen months imprisonment and hard labour.	Indictment.
d and *e.* Sects. 21, 22.	*First offence.* Six months imprisonment and hard labour, or £20 fine, besides the value of the animal.	Conviction before one justice.
	Second offence. Hard labour for twelve months.	Do.

[1] 24 & 25 Vict. c. 96, s. 19.
[2] Ibid. s. 20.
[3] Ibid. s. 21.
[4] Ibid. s. 22.

knowing that the same has been stolen, or was part of a stolen bird or animal; or

(*f.*) [1]who unlawfully and wilfully kills, wounds, or takes any house-dove or pigeon under such circumstances as do not amount to larceny at common law; or

(*g.*) who [2]unlawfully and wilfully uses any dredge or any net, instrument, or engine whatsoever, within the limits of any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken; or unlawfully and wilfully drags upon the ground or soil of any such fishery, with any net, instrument, or engine; or

(*h.*) [3]who steals or cuts, breaks, roots up, or otherwise destroys, or damages, with intent to steal the whole or any part of any tree, sapling, or shrub, or any underwood, the value of the thing stolen, or the amount of the damage done, being a shilling at the least; or

SCHEDULE.

24 & 25 Vict. c. 96, Clauses.	Maximum punishment and other consequences.	How inflicted.
f. Sect. 23.	£2 for each bird killed over and above its value.	Conviction before one justice.
g. Sect. 26	Misdemeanor. Three months imprisonment and hard labour.	Indictment.
h. Sect. 33.	*First offence.* £5 fine over and above the value of the thing stolen.	Conviction before one justice.
	Second offence. Hard labour for twelve months.	Do.
	Subsequent offences. Felony. Punished as simple larceny. (Article 321.)	Indictment.

[1] 24 & 25 Vict. c. 96, s. 23.

[2] Ibid. s. 26.

[3] Ibid. s. 33, S. W.

(*i.*) [1]who steals, or cuts, breaks, or throws down, with intent to steal any part of any live or dead fence, or any wooden post, pale, wire, or rail, set up or used as a fence, or any stile or gate, or any part thereof respectively; or

(*j.*) [2]who fails to satisfy a justice of the peace, on being taken or summoned before him, that he came lawfully by any of the things mentioned in clauses (*g*) or (*h*) found in his possession, or on his premises with his knowledge; or

(*k.*) [3]who steals, or destroys, or damages with intent to steal any plant, root, fruit, or vegetable production, growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse, or conservatory; or

(*l.*) [4]who steals, or destroys, or damages with intent to

SCHEDULE.

24 & 25 Vict. c. 96, Clauses.	Maximum punishment and other consequences.	How inflicted.
i. Sect. 34.	*First offence.* £5 fine over and above the value of the thing stolen.	Conviction before one justice.
	Second offence. Hard labour for twelve months.	Do.
j. Sect. 35.	£2 fine over and above the value of the thing.	Conviction before one justice.
k. Sect. 36.	*First offence.* Six months imprisonment and hard labour, or £20 fine over and above the value of the thing stolen or injury done.	Conviction before one justice.
	Second offence. Felony. Punished as simple larceny. (Article 321.)	Indictment.
l. Sect. 37.	*First offence.* One month's imprisonment and hard labour, or £1 fine over and above the value of the thing stolen. Payment of costs may be ordered. In default of payment a month's imprisonment with or without hard labour, unless payment.	Conviction before one justice.
	Second offence. Hard labour for six months.	Do.

[1] 24 & 25 Vict. c. 96, s. 34.
[2] Ibid. s. 35.
[3] Ibid. s. 36, S. W.
[4] Ibid. s. 37.

steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or enclosed, not being a garden, orchard, pleasure ground, or nursery ground; or

(*m.*) [1] who, being taken or summoned before a justice, does not satisfy such justice that he came lawfully by any goods, merchandise, or articles of any kind belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore, found in his possession, or on his premises with his knowledge; or

(*n.*) [2] who, being summoned by a justice of the peace, does not appear and satisfy such justice that he came lawfully by any goods, merchandise, or articles whatsoever, offered or exposed for sale by him, and unlawfully taken, or reasonably suspected so to have been taken from any ship or vessel in distress, or wrecked, stranded, or cast on shore.

[3] Every one who commits any of the offences specified in clauses (*h*) or (*k*), after being previously convicted of any misdemeanor indictable under 24 & 25 Vict. c. 96, or after two previous summary convictions under 24 & 25 Vict. c. 96, or c. 97, or any of the Acts mentioned in note (2) to Article 321, is liable to a maximum punishment of seven years penal servitude.

SCHEDULE.

24 & 25 Vict. c. 96, Clauses.	Maximum punishment and other consequences.	How inflicted.
m and *n*. Sects. 65, 66.	Six months imprisonment and hard labour, or £20 fine over and above the value of the property. Property to be restored to owner.	Conviction before one justice.

[1] 24 & 25 Vict. c. 96, s. 65

[2] Ibid. s. 66.

[3] Ibid. s. 8, S.W. See note to last article.

CHAPTER XL.

OBTAINING PROPERTY BY FALSE PRETENCES AND OTHER CRIMINAL FRAUDS AND DEALINGS WITH PROPERTY.

ARTICLE 329.

OBTAINING GOODS, ETC., BY FALSE PRETENCES.

EVERY one commits a misdemeanor, and is liable upon conviction thereof to five years penal servitude as a maximum punishment, who

(*a.*) [1] by any false pretence obtains from any other person any chattel, money, or valuable security, with intent to defraud, or who,

(*b.*) [2] with intent to defraud or injure any other person by any false pretence, fraudulently causes or induces any other person to [3] execute any valuable security, or to write, impress, or affix his name, or the name of any other person,[4] upon any paper or parchment, in order that the same may afterwards be made or converted into, or used or dealt with, as a valuable security.

It is not an offence to obtain by false pretences any chattel which is not the subject of larceny at common law, but it is immaterial whether such a chattel so obtained is or is not in existence at the time when the false pretence is made if the thing when made is obtained by the false pretence.

It is not an offence to obtain credit in a partnership account by false pretences as to the amount which a partner is entitled to charge against the partnership funds.

[1] 24 & 25 Vict. c. 96, s. 88, S.; as explained by the cases.

[2] Ibid. s. 90, S. This section was meant to cover such cases as *R.* v. *Danger*, D. & B. 307, and greatly extends the old law on the subject. See Mr. Greaves' note to the section in his edition of the Acts.

[3] Make, accept, endorse, or destroy the whole or any part of.

[4] or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society.

Illustrations.

(1.) [1] A obtains two pointers worth £5 each by a false pretence. This is not an offence within this article.

(2.) [2] A orders a van from B, and gets it made and delivered by falsely pretending to be agent to a company. This is an offence, although the van was not in existence when the pretence was made.

(3.) [3] A travels as agent for his partners, and obtains commission from them by falsely pretending he has received orders. His commission would form a charge on the partnership funds. This is not an offence within this article.

Article 330.

DEFINITION OF "FALSE PRETENCE."

The expression "false pretence," in Article 329, means a false representation made either by words, by writing, or by conduct, that some fact exists or existed, and such a representation may amount to a false pretence, although a person of common prudence might easily have detected its falsehood by inquiry, and although the existence of the alleged fact was in itself impossible.

But the expression "false pretence" does not include

(*a.*) a promise as to future conduct not intended to be kept, unless such promise is based upon or implies an existing fact falsely alleged to exist; or,

(*b.*) such untrue commendation or untrue depreciation of an article which is to be sold as is usual between sellers and buyers, unless such untrue commendation or untrue depreciation is made by means of a definite false assertion as to some matter of fact capable of being positively determined.

Illustrations.

(1.) [4] A, not being a member of the University of Oxford, represents himself to be such by wearing a student's cap and gown, and thereby

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[1] *R.* v. *Robinson*, Bell, 34.

[2] *R.* v. *Martin*, L. R. 1 C. C. R. 56.

[3] *R.* v. *Evans*, L. & C. 755. I am unable to follow the reasoning of this judgment.

[4] *R.* v. *Barnard*, 7 C. & P. 784. The defendant said he was a member of Magdalen College, but Bolland, B., said he would have left the case to the jury on the mere wearing of the dress if nothing had been said.

obtaining a pair of straps from a tradesman in Oxford. This is a false pretence by conduct.

(2.) [1] A presents a note for £5 as a good note for that amount, knowing that the bank by which it was issued had stopped. This is a false pretence by conduct.

(3.) [2] A gives a cheque in discharge of a debt. This is a representation that A has authority to draw upon the bank for the amount of the cheque, and that the cheque is a good and valid order for the payment of money. If these representations are untrue to the knowledge of A, and if he intends to defraud and obtains goods by making them, he commits the offence of obtaining goods by false pretences, but the mere giving of a cheque is not necessarily a representation that the drawer has funds at the bank to meet it.

(4.) [3] The secretary of an Odd Fellows' lodge tells a member that he owes the lodge 13*s.* 6*d.*, and thereby obtains that sum from him, whereas in fact he owed only 2*s.* 2*d.* This is a false pretence, though an inquiry might easily have been made.

(5.) [4] A represents to B that A has power to bring back B's husband (who had run away) over hedges and ditches, and that a certain stuff which A has is sufficient and effectual for that purpose, and thereby obtains from B a dress and two sixpences. This is a false pretence, although the alleged fact is impossible.

(6.) [5] A tells B that A is going to pay his rent on the 1st of March, and wants £10 to make up his rent, whereby he obtains £10 from B. This statement, though false, is not a false pretence, as it relates to something intended to be done at a future time.

(7.) [6] A falsely tells B that A has bought skins, and wants £4 10*s.* to fetch them by the railway, and that he will sell them to B if B will let A have the £4 10*s.* on account, which B does, partly because B believes that A has bought the skins, and partly because B believes that A will sell the skins to B. This is a false pretence, as part of it alleges falsely an existing fact.

(8.) [7] A obtains money from B by promising to marry her, and to furnish

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[1] Per Crompton, J., in *Evans's Case*, Bell, C. C. 192. The rest of the Court seemed to be of the same opinion.

[2] *R.* v. *Hazelton*, L. R. 2 C. C. R. 134. See, too, *R.* v. *Jackson*, 3 Camp. 370; *R.* v. *Parker*, 2 Moo. 1. There was some slight difference of opinion (or rather of expression) amongst the judges in this case. The judges were anxious to point out that to give a cheque on a bank where the drawer has no balance is not necessarily an offence, as he may have a right to overdraw or a reasonable expectation that if he does his drafts will be honoured. These considerations would seem to affect not the falseness of the pretence, but the defendant's knowledge of its falsehood and his intent to defraud.

[3] *Woolley's Case*, 1 Den. 559. See, too, *R.* v. *Jessop*, D. & B. 442.

[4] *R.* v. *Giles*, L. & C. 502.

[5] *Lee's Case*, L. & C. 309.

[6] *R.* v. *West*, D. & B. 575.

[7] *R.* v. *Jennison*, L. & C. 157.

a house with the money, representing himself to be an unmarried man. A in fact is married. The representation that A was unmarried is a false pretence, though the promises based upon it would not have been false pretences without it.

(9.) [1] A induces B to lend him money by saying that certain spoons are of the best quality, that they are equal to Elkington's A (a description known in the trade), that the foundation is of the best material, and that they have as much silver in them as Elkington's A. These words being construed as mere exaggeration of the quality of the spoons, and not as containing a statement of a definite fact as to the quantity of silver in the spoons, are not a false pretence.

(10.) [2] A induces B to buy a chain by saying, "It is 15-carat gold, and you will see it stamped fine on every link. It was made for me, and I paid nine guineas for it. The maker told me it was worth £5 to sell as old gold." The chain had on every link the mark 15-ct. The chain in fact was 6-carat gold, worth in all £3 0*s.* 3*d.* This is a false pretence.

ARTICLE 331.

OF "OBTAINING."

[3] The word "obtains," in Article 329, means an obtaining by the offender from the owner, with an intent on the part of the offender to deprive the owner permanently and entirely of the thing obtained, and it includes cases in which things are obtained by a contract which is obtained by a false pretence, unless the obtaining under the contract is remotely connected with the false pretence.

[4] Whoever, by any false pretence, causes or procures any money to be paid, or any chattel or valuable security to be delivered to any other person for the use or benefit, or on account of the person making such false pretence, or of any

[1] *R.* v. *Bryan*, D. & B. 265. This, I think, is the true view of the case. Willes, J., and Bramwell, B., thought the conviction should be sustained on the ground that the representation that the spoons had as much silver on them as Elkington's A was a specific false pretence as to an existing fact. Ten other judges (Campbell, C.J., Cockburn, C.J., Pollock, C.B., Coleridge, Cresswell, Erle, Crompton, Crowder, JJ., and Watson and Channell, BB.), all said in different words that the language used was mere puffery. The principle does not appear to have been doubted. The case is often, but I think wrongly, supposed to decide that a misrepresentation as to quality cannot be a false pretence. This depends on the further question whether the representation is made by means of alleging the existence of a fact which does not exist. *R.* v. *Foster*, 46 L. J. (M. C.) 128, is a later illustration of the principle of *R.* v. *Bryan*.

[2] *R.* v. *Ardley*, L. R. 1 C. C. R. 301.

[3] Illustrations (1)–(6).

[4] 24 & 25 Vict. c. 96, s. 89.

other person, with intent to defraud, is deemed to have obtained such money, chattel, or valuable security within the meaning of Article 329.

[1] If the person from whom anything is obtained by a person making a false pretence is not deceived by such false pretence, but delivers the thing intended to be obtained by it, knowing the pretence to be false, such thing is not deemed to have been obtained by such pretence.

[2] If a thing is obtained by the joint effect of several false pretences, any one of which is a false pretence within the meaning of the last Article, and if the thing would not have been obtained without that false pretence, it is deemed to have been obtained by such false pretence.

Illustrations.

(1.) [3] A draws a bill upon B in London and gets it discounted by C in Russia by falsely pretending, by means of a forged authority, that he is authorized to draw upon B for the amount of the bill. A does not attempt to obtain money by false pretences from B, though he meant that C should forward the draft to B, and should obtain payment of the amount, and though his act if done in England would have been an obtaining by false pretences from C.

(2.) [4] A by a false pretence obtains from B, a livery stable keeper, the use of a horse for the day for which he would have been charged 7*s*. This is not obtaining goods by false pretences, as the horse was returned.

(3.) [5] A, by false pretences, induces B to enter into partnership with him, and to advance £500 as part of the capital of the concern. B treats the partnership as an existing one, and endeavours to dispose of his interest in it. A has not obtained £500 by false pretences; as B, as partner, retained his interest in it.

(4.) [6] A induces B to buy a cheese at a higher price than it is worth, by inserting in it a taster of superior quality to the rest of the cheese, and so making B believe that the whole cheese was of the same quality as the taster. This is obtaining money by a false pretence.

(5.) [7] A induces B to lend him £100 on a deposit of title deeds to land, by

[1] *Illustration (7).*

[2] *Illustration (8).*

[3] *R.* v. *Garrett*, Dear. 232.

[4] *R.* v. *Kilham*, L. R. 1 C. C. R. 261.

[5] *R.* v. *Watson*, D. & B. 348. The judges guarded in their judgment against the notion that fraudulently inducing a man to enter into a partnership could in no case be within the statute, as, for instance, of the alleged existence of any trade which was a false pretence.

[6] *R.* v. *Abbott*, 1 Den. 273.

[7] *R.* v. *Burgon*, D. & B. 11.

falsely pretending that a house had been built upon it worth £300. This is obtaining £100 by a false pretence.

(6.) [1] A, by falsely pretending to be a naval officer, induces B to enter into a contract to board and lodge him at a guinea a week, and under this contract is supplied with food for a week. This is not obtaining food by false pretences, as the supply of food in consequence of the contract is too remotely the result of the false pretence to become the subject of an indictment.

(7.) [2] A makes a false pretence to B to obtain money, which pretence is false to B's knowledge. B pays A the money and prosecutes him for obtaining it by a false pretence. This is not obtaining money by a false pretence.

(8.) A falsely pretends to B, 1, that he is an unmarried man; 2, that he will marry B; 3, that if B will give him £8 he will furnish a house for himself and her to live in after marriage. By these false pretences he obtains the £8. He is deemed to have obtained the £8 by the false pretence that he is an unmarried man, which is a false representation as to an existing fact.

ARTICLE 332.

INTENT TO DEFRAUD.

An intent to defraud, in the case of offences against Article 329, is consistent with an intent to undo the effect of the fraud if the offender should be able to do so.

Illustration.

(1.) [3] A by false pretences induces B to let him have some carpets, intending to pay for them if he should be able to do so. This is an intent to defraud.

ARTICLE 333.

CHEATING AT PLAY.

[4] Every one is deemed guilty of obtaining money or a valuable thing by a false pretence with intent to cheat or defraud, and is liable to be punished accordingly, who wins from any other person to himself or any other or others, any

[1] *R.* v. *Gardner*, D. & B. 40.

[2] *R.* v. *Mills*, D. & B. 205. It was, however, an attempt to obtain money by a false pretence.

[3] *R.* v. *Naylor*, L. R. 2 C. C. R. 4.

[4] 8 & 9 Vict. c. 100, s. 17. See *R.* v. *Hudson*, Bell, C. C., 263, for an illustration of what does not amount to a "game." As to "winning," it has been doubted whether the money, &c., must be actually obtained, or whether winning the game by a false pretence would be within the section if the loser refused to pay the money: *R.* v. *Moss*, D. & B. 104.

sum of money or valuable thing by any fraud or unlawful device, or its practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise.

Article 334.

OBTAINING CREDIT, ETC., BY FALSE PRETENCES.

[1] Every one commits a misdemeanor, and is liable upon conviction thereof to twelve months imprisonment and hard labour, as a maximum punishment, who,

(*a.*) in incurring any debt or liability, obtains credit under false pretences, or by means of any other fraud; or,

(*b.*) with intent to defraud his creditors or any of them, makes or causes to be made any gift, delivery, or transfer of or any charge on his property; or,

(*c.*) with intent to defraud his creditors, conceals or removes any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

Article 335.

CONCEALING DEEDS AND INCUMBRANCES.

[2] Every one commits a misdemeanor and is liable, upon conviction thereof, to a maximum punishment of two years imprisonment and hard labour, who, being a seller or mortgagor of land, of any chattels, real or personal, or choses in action conveyed or assigned to a purchaser, [2] or mortgagee, or, being the solicitor or agent of any such seller or mortgagor, conceals from the purchaser any settlement, deed, will, or other instrument material to the title, or any incumbrance, or falsifies any pedigree on which the title does or may depend,

[1] 32 & 33 Vict. c. 62, s. 13: The Debtors Act, 1869.

[2] 22 & 23 Vict. c. 35, s. 24. The words "or mortgagee" were added by 23 & 24 Vict. c. 38, s. 8. The Attorney-General's consent is necessary to a prosecution for this offence.

in order to induce him to accept the title offered or produced to him, and with intent to defraud.

Article 336.

CONSPIRACY TO DEFRAUD OR EXTORT.

Every one commits the misdemeanor of conspiracy who agrees with any other person or persons to do any act with intent to defraud the public, or any particular person, or class of persons, or to extort from any person any money or goods. Such a conspiracy may be criminal although the act agreed upon is not in itself a crime.

[1] An offender convicted of this offence may be sentenced to hard labour.

Illustrations.

The following are instances of conspiracies with intent to defraud:—

[2] A conspiracy to defraud the public by a mock auction.

[3] A conspiracy to raise the price of the funds by false rumours.

[4] A conspiracy to defraud the public by issuing bills in the name of a fictitious bank.

[5] A conspiracy to induce a person to buy horses by falsely alleging that they were the property of a private person, and not of a horse dealer.

[6] A conspiracy to induce a man to take a lower price than that for which he had sold a horse, by representing that it had been discovered to be unsound and re-sold for less than had been given for it.

[7] A conspiracy to defraud a partner by false accounts, the fraud not being in itself criminal when it was committed.

[8] A conspiracy to defraud generally by getting a settling day for shares of a new company.

Article 337.

PRETENDING TO EXERCISE WITCHCRAFT.

[9] Every one commits a misdemeanor and must, upon con-

[1] 14 & 15 Vict. c. 100, s. 29.

[2] *R.* v. *Lewis*, 11 Cox, C. C. 404.

[3] *R.* v. *De Berenger*, 3 M. & S. 67.

[4] *R.* v. *Heven*, 2 East, P. C. 858.

[5] *R.* v. *Kenrick*, 5 Q. B. 49.

[6] *Carlisle's Case*, Dear. 337.

[7] *R.* v. *Warburton*, L. R. 1 C. C. R. 274.

[8] *R.* v. *Aspinall*, L. R. 1 Q. B. D. 730.

[9] 9 Geo. 2, c. 5, s. 4. The offender was also to be pilloried every quarter for an hour in a market town on a market day, but the pillory is abolished by 7 Will. 4 & 1 Vict. c. 23. Would it be a good defence to an indictment for this offence to prove that the defendant not only "pretended," but actually practised witchcraft?

viction thereof, be imprisoned for a year, and may be obliged to give sureties for his good behaviour in such sum and for such time as the Court thinks fit, who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.

ARTICLE 338.

CHEATING.

Every one commits the misdemeanor called cheating, who fraudulently obtains the property of another by any deceitful practice not amounting to felony, which practice is of such a nature that it directly affects, or may directly affect, the public at large. But it is not cheating within the meaning of this Article to deceive any person in any contract or private dealing by lies unaccompanied by such practices as aforesaid.

Illustrations.

(1.) The following are instances of cheating:—

[1] Selling by a false weight or measure even to a single person.

[2] Selling clothing with the alnager's seal forged upon it.

[3] Selling a picture by means of an imitation of the name of a well-known artist inscribed upon it.

[4] Maiming oneself in order to have a pretext for begging.

[5] Selling unwholesome bread as if it were wholesome.

2. The following cases are instances of frauds not amounting to cheating:—

[6] Delivering short weight of bread, no false weights or tokens being used.

[7] Receiving barley to grind and delivering a mixture of oat and barley meal.

[8] Selling as a Winchester bushel a sack of corn which is not a Winchester bushel, but greatly deficient.

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[1] *R.* v. *Young*, 3 T. R. 104.
[2] 2 Russ. Cr. 609.
[3] *R.* v. *Closs*, D. & B. 460.
[4] 1 Hawk. P. C. 55; 2 Russ. Cr. 609.
[5] 2 East, P. C. p. 822; *R.* v. *Dixon*, 3 M. & S. 11.
[6] *R.* v. *Eagleton*, Dear. 376.
[7] *R.* v. *Haynes*, 4 M. & S. 214.
[8] *Pinckney's Case*, 2 East, P. C. 818.

Article 339.

SERVANTS FEEDING HORSES, ETC., AGAINST ORDERS.

[1] Every servant commits a misdemeanor, and is liable upon summary conviction thereof before two justices of the peace, as a maximum punishment, to three months imprisonment and hard labour or to a fine of £5, and in default of payment before a time to be fixed by the justices, to imprisonment with hard labour for three months, unless the fine is sooner paid,

who, contrary to the orders of his master, takes from his possession any corn, pulse, roots, or other food, for the purpose of giving the same or having the same given to any horse or other animal belonging to or in the possession of his master. But the commission of such an offence does not amount to larceny, notwithstanding anything hereinbefore contained.

Article 340.

FRAUDULENTLY CONCEALING ORE.

[2] Every one commits felony and is liable upon conviction thereof to a maximum punishment of two years imprisonment and hard labour,

who, being employed in or about any mine, takes, removes, or conceals any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found, or being in such mine with intent to defraud any proprietor of, or any adventurer in, any such mine, or any workman or miner employed therein.

Article 341.

TAKING MARKS FROM PUBLIC STORES.

[3] Every one commits felony, and is liable upon conviction

[1] 26 & 27 Vict. c. 103, s. 1.

[2] 24 & 25 Vict. c. 96, s. 39, S. Re-enacting earlier provisions. Passed in consequence of decision in *R.* v. *Webb*, 1 Moo. 431.

[3] 38 & 39 Vict. c. 25, s. 5. The same Act contains many offences punishable on summary conviction too special to be inserted here.

thereof to a maximum punishment of seven years penal servitude,

who, with intent to conceal Her Majesty's property in any stores under the care, superintendence, or control of a Secretary of State, or the Admiralty, or any public department or office, or of any person in the service of Her Majesty, takes out, destroys, or obliterates wholly or in part any mark described in the 1st schedule to the Public Stores Act, 1875 (38 & 39 Vict. c. 25), or any mark whatsoever denoting the property of Her Majesty in any stores.

Article 342.

CONCEALING TREASURE TROVE.

[1] Every one commits a misdemeanor who conceals from the knowledge of our Lady the Queen the finding of any treasure, that is to say, of any gold or silver in coin, plate, or bullion hidden in ancient times, and in which no person can shew any property. It is immaterial whether the offender found such treasure himself or received it from a person who found it, but was ignorant of its nature.

[1] 3rd Inst. 132. And see *R.* v. *Thomas*, L. & C. 313.

CHAPTER XLI.

FRAUDS BY AGENTS, TRUSTEES, AND OFFICERS OF PUBLIC COMPANIES—FALSE ACCOUNTING.

ARTICLE 343.

PUNISHMENT OF MISDEMEANORS IN THIS CHAPTER.

EVERY one who commits any of the misdemeanors defined in this chapter is liable, upon conviction thereof, to a maximum punishment of seven years penal servitude.

ARTICLE 344.

"MISAPPROPRIATE" DEFINED.

[1]In this chapter the word "misappropriate" means converting any of the things in respect of which the offences defined in it are committed to the use or benefit of the offender, or to the use or benefit of any person other than the person by whom the offender was intrusted therewith. In regard to each of the offences defined in Articles 345, 346, and 347, it is immaterial whether the offender was intrusted with the thing in respect of which the offence was committed solely, or jointly with any other person.

[2] ARTICLE 345.

MISAPPROPRIATIONS BY BANKERS, MERCHANTS, ETC.

Every banker, merchant, broker, solicitor, or other agent commits a misdemeanor,

(*a.*) who, having been intrusted as such with any money or security for the payment of money, with any direction in [3]writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds, or any part of

[1] This article is simply a drafting abridgment from the sections referred to in the following articles.

[2] 24 & 25 Vict. c. 96, s. 75, S.

[3] As to what amounts to a direction in writing, see *R.* v. *Christian*, L. R. 2 C. C. R. 94.

the proceeds of such security, for any purpose or to any person specified in such direction, misappropriates the same in violation of good faith and contrary to the terms of such direction, or

(*b.*) [1] who, being intrusted as such, with any chattel or valuable security, or any power of attorney for the sale or transfer of any [2] stock, for safe custody or for any special purpose, and without any authority to sell, negotiate, transfer, or pledge the same, sells, negotiates, transfers, pledges, or misappropriates the same, or the proceeds of the same, or any part thereof, or the share or interest to which such power of attorney relates or any part thereof, in violation of good faith and contrary to the object or purpose for which it was intrusted to him, or

(*c.*) [3] who, being intrusted as such with the property of any other person for safe custody, with intent to defraud, sells, negotiates, transfers, pledges, or misappropriates the same or any part thereof.

[4] Clause (*b*) does not extend to an agent who disposes of a chattel, valuable security, or power of attorney according to unwritten instructions given to him, and subsequently misappropriates the proceeds thereof, unless (possibly) he is proved to have had an intention to misappropriate the proceeds at the time when he disposed of the chattel, valuable security, or power of attorney.

ARTICLE 346.

MISAPPROPRIATION UNDER POWER OF ATTORNEY.

[5] Every one commits a misdemeanour who, being intrusted with any power of attorney for the sale or transfer of any

[1] 24 & 25 Vict. c. 96, s. 75.

[2] Stock means "any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, and society."

[3] 24 & 25 Vict. c. 96, s. 76, S.

[4] This seems to be the effect of *R.* v. *Tatlock*, 2 Q. B. D. 157, and *R.* v. *Cooper* L. R. 2 C. C. R. 123. In *R.* v. *Tatlock* the judges were not altogether unanimous.

[5] 24 & 25 Vict. c. 96, s. 77, S.

property, fraudulently sells or transfers, or misappropriates the same, or any part thereof.

Article 347.

MISAPPROPRIATION BY FACTORS OR AGENTS.

[1] Every factor or agent intrusted, for the purpose of sale or otherwise, with the possession of any [2] goods, or of any document of title to goods, commits a misdemeanor who, contrary to or without the authority of his principal and for the use or benefit of himself or any person other than the person by whom the goods were intrusted to him, and in violation of good faith,

(*a.*) [3] makes any consignment, deposit, transfer, or delivery of any goods or document of title so entrusted to him as and by way of a pledge, lien, or security for any money or valuable security thereon borrowed or received, or intended to be thereafter borrowed and received by him; or

(*b.*) [4] accepts any advance of any money or valuable

[1] 24 & 25 Vict. c. 96, s. 78, S.

[2] Any factor or agent intrusted as mentioned above, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, is deemed to have been intrusted with the possession of the goods represented by such document of title (s. 79), S.

A factor or agent is deemed to be in possession of goods whether the same are in his actual custody or held by any other person subject to his control, or for him or on his behalf (s. 79).

A factor or agent in possession of such goods or documents is taken to have been intrusted therewith by the owner thereof unless the contrary is shown (s. 79).

[3] Every contract, pledging, or giving a lien upon such document of title is deemed to be a pledge of and lien upon the goods to which the same relates (s. 79).

[4] Where any loan or advance is *bonâ fide* made to any such factor or agent on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title, and such goods or documents of title are actually received by the person making the loan or advance without notice of the factor's or agent's want of authority, the loan or advance is deemed to be made on the security of the goods, though the goods or documents of title are not actually received by the person making the advance till "the period subsequent thereto" (s. 79). The necessity for this explanation, which is taken from part of s. 79, is not very obvious, nor do I understand what particular period is referred to by the concluding words.

security on the faith of any [1] contract or agreement to consign, deposit, transfer or deliver any such goods or document of title.

[1] Provided, in each case, that the amount for which such goods or documents are made security in any of the ways aforesaid exceeds the amount justly due to such agent from his principal at the time when the security is given, together with the amount of any bill of exchange drawn by or on account of such principal and accepted by such factor or agent.

Article 348.

CLERKS, ETC., ASSISTING IN PROCURING ADVANCES.

[2] Every clerk, or other person, who knowingly and wilfully acts and assists in making any [3] security, or accepting or procuring any advance mentioned in Article 347, commits a misdemeanor.

Article 349.

FRAUDULENT TRUSTEES.

[4] Every [5] trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, who with intent to defraud misappropriates the same, or otherwise disposes of or destroys such property or any part thereof, commits a misdemeanor.

A public purpose is such a purpose as would be recognized as public in a court of law, and not a purpose the execution of which is a matter of public importance.

[1] Any contract or agreement, whether made direct with such factor or agent or with any clerk or other person on his behalf, is deemed to be a contract or agreement with such factor or agent (s. 79). Of course it is.

[2] 24 & 25 Vict. c. 96, s. 78, S.

[3] "Any such consignment, deposit, transfer, or delivery."

[4] 24 & 25 Vict. c. 96, s. 80, S.

[5] "Trustee" means a trustee on some express trust created by some deed, will, or instrument in writing, and includes the heir or personal representative of any such trustee and any other person upon or to whom the duty of such trust has devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present (6 Aug. 1861) or future Act of Parliament relating to joint stock companies, bankruptcy, or insolvency: 24 & 25 Vict. c. 96, s. 1.

Illustrations.

(1.) [1] The trustees of a savings bank, which has printed rules, one of which directs the manner in which the funds are to be invested, are trustees on an express trust created by an instrument in writing, but not for a public purpose.

(2.) [2] The purposes of an institution exempted from liability to the poor-rate would be public.

ARTICLE 350.

FRAUDS BY DIRECTORS AND PUBLIC OFFICERS.

Every director or public officer of any body corporate or public company commits a misdemeanor who

(*a.*) [3] fraudulently takes, or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company; or

(*b.*) [4] as such receives or possesses himself of any of the property of such body corporate or public company, otherwise than in payment of a just debt and demand, and, with intent to defraud, omits to make, or to cause and direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company; or

(*c.*) [5] with intent to defraud, destroys, alters, mutilates, or falsifies any book, paper, writing, or valuable security belonging to the body corporate or public company; or

makes or concurs in the making of any false entry; or

omits or concurs in omitting any material particular in any book of account or other document; or

(*d.*) [6] makes, circulates or publishes, or concurs in making, circulating or publishing, any written statement or account which he knows to be false in any material particular with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company;

[1] *R.* v. *Fletcher*, L. & C. 180.
[2] *R.* v. *Fletcher*, L. & C. p. 203.
[3] 24 & 25 Vict. c. 96, s. 81, S.
[4] Ibid. s. 82, S.
[5] Ibid. s. 83, S.
[6] Ibid. s. 84, S.

or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof.

The offences defined in clauses (*a.*) and (*c.*) may be committed by members, and the offences defined in clauses (*b*), (*c.*), and (*d.*) by managers of bodies corporate and public companies, as well as by the directors or public officers thereof.

Article 351.

RULE OF EVIDENCE.

[1] No one is entitled to refuse to make a full and complete discovery by answer to any statement of claim for discovery, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy, upon the ground that his doing so might tend to shew that he had committed any of the offences defined in Articles 345 to 350, both inclusive.

No one is liable to be convicted of any such misdemeanor by any evidence whatever in respect of any act done by him, if he has at any time, previous to his being charged with such offence, [2] first disclosed such act on oath in consequence of any compulsory process of any Court which, in 1861, was a Court of either law or equity, in any action, suit, or proceeding *bonâ fide* instituted by any pârty aggrieved, or if he has [2] first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency.

Article 352.

FRAUDULENT FALSE ACCOUNTING.

[3] Every one commits a misdemeanor who, being a clerk, officer or servant, or employed or acting in the capacity of a

[1] 24 & 25 Vict. c. 96, s. 85.

[2] On this word, which was not in the earlier Act, 5 & 6 Vict. c. 39, s. 6, see *R.* v. *Skeen*, Bell, C. C. 97.

[3] 38 & 39 Vict. c. 24, s. 2.

clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates, or falsifies any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer;

or wilfully and with intent to defraud, makes or concurs in making any false entry in, or omits or alters, or concurs in omitting or altering any material particular from or in any such book, or any document or account.

CHAPTER XLII.

RECEIVING.

ARTICLE 353.

RECEIVING DEFINED.

[1] A person is said to receive goods improperly obtained as soon as he obtains control over them from the person from whom he receives them.

Where goods are received by a wife or servant, in the husband's or master's absence, with a guilty knowledge on the part of such wife or servant, the husband or master does not become a receiver only by acquiring a guilty knowledge of the receipt of the goods by such wife or servant, and passively acquiescing therein, but he does become a receiver with a guilty knowledge if, having such knowledge, he does any act approving of the receipt of the goods.

Property ceases to be stolen or otherwise improperly obtained within the meaning of this Article as soon as it comes into the possession of the general or special owner, and if such general or special owner delivers it to some one who delivers it to a person who receives it knowing of the previous theft or other obtaining, such receiving is not an offence within this Article.

[1] *R.* v. *Wiley*, 2 Den. 37. In this case the thieves carried stolen fowls into a stable belonging to the receiver's father. The receiver lighted them in, and was taken in the act of bargaining for them as they lay on the ground between the three men. Eight judges to four held that the conviction must be quashed; substantially they all agreed in the proposition given in the text, but they differed on the question whether, under the circumstances, the receiver had the control of the fowls or not. There was also some difference as to the effect of the terms in which the question had been left to the jury by the chairman of sessions who stated the case. For these reasons I have not attempted to turn the case into an illustration. The case of *R.* v. *M. Smith*, Dear. 494, is somewhat similar. See, too, *R.* v. *Hill*, 1 Den. 453. In *R.* v. *Miller*, 6 Cox, C. C. 353, a person was found guilty of receiving who had never had possession of the goods except by a servant.

Illustrations.

(1.) [1] A's wife in A's absence receives stolen potatoes knowing them to be stolen. The jury find that A "afterwards adopted his wife's receipt." This finding is not sufficient to sustain a verdict of guilty, as it is consistent with A's having passively consented to what his wife had done without taking any active part in the matter.

(2.) [2] A's wife in A's absence receives stolen goods and pays the thief 6*d.* on account. The thief then tells A, who strikes a bargain with the thief, and pays him the balance. A has received stolen goods knowing them to be stolen.

(3.) [3] B steals C's property. C finds it in B's pocket, restores it to B, and tells B to sell it at the same place where he has sold other property of C's. B sells it to A, who knows that it has been stolen. A commits no offence, as the property after being stolen has got into the owner's hands.

(4.) [4] B steals goods from a railway to which they have been bailed. B then sends the goods to A by the same railway. A receives them, knowing them to have been stolen, from the railway porter knowing them to have been stolen. A policeman employed by the railway discovers whilst the goods are in transit that they have been stolen, and causes them to be delivered to A in order to detect him. A has committed no offence under this Article.

ARTICLE 354.

RECEIVING PROPERTY UNLAWFULLY OBTAINED.

Everyone commits an offence amounting, in cases (*a*), (*b*), and (*d*), to felony, and in case (*c*) to misdemeanor, and is liable upon conviction thereof, as a maximum punishment, to penal servitude for life in case (*a*), and to penal servitude for fourteen years in case (*b*), and to penal servitude for seven years in cases (*c*) and (*d*), who does any of the following things (that is to say):—

(*a.*) [5] who receives any post letter or post letter-bag, or any chattel, or money, or valuable security, the stealing, taking, embezzling, or secreting whereof is referred to in Article 324, clause (*b*), knowing the same to have been

[1] *R.* v. *Dring*, D. & B. 329.

[2] *R.* v. *Woodward*, L. & C. 122. A husband can receive from a wife who steals on her own account in his absence: *R.* v. *M'Athey*, L. & C. 230.

[3] *R.* v. *Dolan*, Dear. 436.

[4] *R.* v. *Schmidt*, L. R. 1 C. C. R. 15. Erle, C.J., and Mellor, J., dissented, on the ground that the company were the innocent agents of the thieves, and that the policeman merely looked at the goods, and took no possession of them.

[5] 7 Will. 4 & 1 Vict. c. 36, s. 30.

feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post; or

(*b.*) [1] who receives any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof is a felony, either at common law or by the 24 & 25 Vict. c. 96 ([2]but not by 31 & 32 Vict. c. 116), knowing the same to have been so dealt with; or

(*c.*) [3] who, knowing the same to have been so dealt with, receives any chattel, money, valuable security, or other property which may have been stolen, taken, obtained, converted, or disposed of in such a manner as to amount to a misdemeanor by 24 & 25 Vict. c. 96; or

(*d.*) [4] who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, stolen, taken, obtained, extorted, embezzled, converted, or disposed of by any felony or misdemeanor prohibited by 24 & 25 Vict. c. 96, unless he uses all due diligence to cause the offender to be brought to trial for the same.

[1] 24 & 25 Vict. c. 96, s. 91, S. W.

[2] Which makes stealing by a partner, &c., felony, see *supra*, Art. 246: *R.* v. *Smith*, L. R. 1 C. C. R. 266, an instructive, but I think a most unfortunate, decision. It is exactly in the same spirit as *R.* v. *Sadi*, 1 Lea. 468, in which it was held that to receive a bank note knowing it to be stolen was not felony, because bank notes are not the subject of larceny at common law. See, too, *R.* v. *Robinson*, Bell, C. C. 34, Art. 329, Illustration (1).

[3] 24 & 25 Vict. c. 96, s. 95, S. W.

[4] Ibid. s. 101, S. W. (in the case of males under eighteen. In all other cases whipping is confined to males under sixteen).

CHAPTER XLIII.

FORGERY IN GENERAL.

ARTICLE 355.

DEFINITION OF FORGERY—INTENT TO DEFRAUD.

FORGERY is making a false document, as defined in Article 356, with intent to defraud.

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact; nor by the fact that he had, or thought he had, a right to the thing to be obtained by the false document.

The presumption may be rebutted by proof that at the time when the false document was made there was no person who could be reasonably supposed by the offender to be capable of being defrauded thereby; but it is not necessarily rebutted by proof that there was no person who could in fact be defrauded thereby.

It is uncertain whether, in the absence of any evidence as to the existence of any person who can be defrauded by a false document, an intent to defraud will or will not be presumed from the mere making of the document.

An intent to deceive the public or particular persons, but not to commit a particular fraud or specific wrong upon any particular person, is not an intent to defraud within the meaning of this Article.

Illustrations.

(1.) [1] A makes a false receipt, the effect of which, if the receipt were genuine, would be to render B accountable to C for a larger sum than B has in fact received on C's account. A is presumed to have intended to

[1] *R.* v. *Hill*, 2 Moo. C. C. 30.

defraud, although the receipt was not used in fact, and was probably not intended to be used in fact for the purpose of increasing B's liability.

(2.) [1] A imitates a Bank of England note with intent to defraud any person to whom it may be passed, but without specially intending to defraud the Bank of England. This is an intent to defraud.

(3.) [2] A makes a false acceptance to a bill of exchange, and puts it in circulation, intending to take it up, and actually taking it up before the bill is presented to the acceptor for payment. This is forgery with intent to defraud.

(4.) [3] A being directed by his master to fill up a blank cheque with an amount to be ascertained, and to take up a bill with the proceeds, A fills it up for a larger amount and keeps the difference on a claim that it was due to him for salary. Here there is an intent to defraud.

(5.) [4] A pays to his credit at a bank a false promissory note. The bank hold guarantees for a much larger amount. Notwithstanding this the inevitable conclusion is that he meant to defraud.

(6.) [5] A signs B's name without his authority to two deeds of transfer of railway shares, by one of which the shares purport to be transferred by C to B, and by the other to be transferred from B to D. The circumstances are such that no one can be defrauded by these deeds. [6] This rebuts the presumption of an intent to defraud raised by the writing of B's name.

(7.) [7] A imitates a cheque in B's handwriting and name on a bank at which, to A's knowledge, B had long ceased to keep an account. The jury may infer from this an absence of intent to defraud.

(8.) [7] A imitates a cheque in B's name on a bank from which B had, without A's knowledge, withdrawn his balance the day before. Here the fact that no one could be defrauded by the false cheque does not rebut the presumption of an intent to defraud.

(9.) [8] A makes a false will. It does not appear whether there was or was

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[1] 24 & 25 Vict. c. 96, s. 44, would now apply in terms to such a case. In *R.* v. *Mazagora*, R. & R. 291, the judges held that the jury ought in such a case to have found an intent to defraud the Bank of England.

[2] *R.* v. *Geach*, 9 C. & P. 499; and in the case stated by Coleridge, J., in *R.* v. *Todd*, 1 Cox, C. C. 57.

[3] *R.* v. *Wilson*, 1 Den. 284.

[4] Compare *R.* v. *James*, 7 C. & P. 553, with *R.* v. *Cooke*, 8 C. & P. 582–5. I have taken the very words of Patteson, J. "Inevitable conclusion" is a little less strong and distinct than "conclusive presumption of law," an expression which the judge seems to have shrunk from.

[5] This is a barely possible supposition, though Cresswell, J., held that it was so in *R.* v. *Marcus*, 2 C. & K. 356. Rolfe, B., held otherwise in *R.* v. *Hontson*, 2 C. & K. 777, see note.

[6] *R.* v. *Marcus*, 2 C. & K. 356.

[7] This and Illustration (6) are founded on the dictum of Maule, J., in *R.* v. *Nash*, 2 Den. C. C. 499.

[8] *Tuff's Case*, 1 Den. C. C. 319. The Court were equally divided on a question which, I submit, was substantially the one stated.

not any person who could be defrauded by it. It is uncertain whether an intent to defraud is or is not to be presumed.

(10.) [1] A forges a diploma of the College of Surgeons, intending to induce a belief that the document is genuine, and that he is a member of the College of Surgeons, and shows it to two persons with intent to induce that belief in them. This is not an intent to defraud within the meaning of this Article, though it is an intent to deceive.

Article 356.

MAKING A FALSE DOCUMENT DEFINED.

To make a false document is

(*a.*) [2] to make a document purporting to be what in fact it is not;

(*b.*) [3] to alter a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document;

(*c.*) [4] to introduce into a document without authority, whilst it is being drawn up, matter which, if it had been authorized, would have altered the effect of the document;

(*d.*) to sign a document

(i.) in the name of any person without his authority, whether such name is or is not the same as that of the person signing;

[5] (ii.) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing;

[6] (iii.) in a name represented as being the name of a different person from that of the person signing it, and intended to be mistaken for the name of that person;

[7] (iv.) in a name of a person personated by the person sign-

[1] *R.* v. *Hodgson*, D. & B. 3. It would, however, be an offence under the Medical Act, 21 & 22 Vict. c. 90, s. 40. This Act was passed in 1858, two years after the decision of *R.* v. *Hodgson*. The offence is "falsely pretending to be, &c., a surgeon, &c.," and the penalty is £20. The forgery of a diploma would seem to deserve more severe punishment.

[2] Illustration (1).

[3] Illustrations (2) and (3).

[4] Illustrations (4) and (5).

[5] Illustrations (6) and (7).

[6] Illustration (8).

[7] Illustration (9).

ing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.

But it is not making a false document,

[1] to procure the execution of a document by fraud;

[2] to omit from a document being drawn up matter which would have altered its effect if introduced, and which might have been introduced, [3] unless the matter omitted qualifies the matter inserted;

[4] to sign a document in the name of a person personated by the person who signs it, provided that the effect of the instrument does not depend upon his identity with that person.

[5] It is not essential to the making of a false document that the false document should be so framed that if genuine it would have been valid or binding, provided that in cases in which the forgery of any particular instrument is made a specific offence by any statute, the false document must in order that the offence may be completed fall within the description given in the Act.

[6] The fact that a document is made to resemble that which it purports to be and is not, is evidence for the consideration of the jury of an intent to defraud, but is not essential to the making of a false document.

[7] Provided that in cases in which the forgery of any particular instrument is made a specific offence by any statute, the false document must have such a resemblance to the document which it is intended to resemble as to be likely to deceive a common person.

Illustrations.

(1.) [8] A conveys land to B in fee. Afterwards A and C draw up and

[1] Illustrations (10), (11).
[2] Illustration (12).
[3] Illustration (13).
[4] Illustration (14).
[5] Illustrations (15)—(17).
[6] Illustration (18).
[7] Illustration (19).
[8] *R.* v. *Ritson*, L. R. 1 C. C. R. 200, and in 1 Hawk. P. C. 264.

execute a deed purporting to be of earlier date than the conveyance to B, by which the same land purports to be let to C for a term of 999 years. The second deed is a false document, though executed by A and C.

(2.) [1] A obtains a blank acceptance from B, with authority to fill it up for any amount not exceeding £200. A fills it up for £500. This is a false document.

(3.) [2] A persuades his servant, William Wilkinson, to write his name across a stamped paper, so as to appear to be the name of the acceptor of a bill of exchange. A then fills up the bill and addresses it to Mr. William Wilkinson, Halifax, so as to make the bill appear as if it had been drawn upon and accepted by a different William Wilkinson. This is a false document.

(4.) [3] A gets B to sign a receipt, and afterwards makes additions to it, so as to make it appear that a larger sum was paid to B than had actually been paid. The altered receipt is a false document.

(5.) [4] A, employed to draw up B's will, inserts in it legacies out of his own head. The will is a false document.

(6.) [5] Sheppard signs a draft in the name of H. Turner, Junior, of Noah's Row, Hampton Court, there being no such place or person. The note is a false document.

(7.) [6] Thomas Brown authorizes B to sign a promissory note in the name of Thomas Brown, in order that it might be used as the note of a different and entirely fictitious Thomas Brown. This is a false document, whether B knew or not of the use for which the note was intended.

(8.) [7] B agrees to give A time for the payment of a debt, if A will get his mother-in-law, C. Watters (whose Christian name is unknown to B), to execute a promissory note. A gets his wife to sign the note in her maiden name, "A. Watters," and produces the note to B as the note of his mother-in-law. This is a false document.

(9.) [8] A, personating the Hon. A. A. Hope, the brother of the Earl of Hopetown, draws a bill of exchange in the name of A. A. Hope on a person to whom he was known by that name, and who would have paid it if A had really been A. A. Hope, the brother of the Earl of Hopetown. The bill is a

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[1] *R.* v. *Hart*, R. & M. 486; 7 C. & P. 652. In this case the words "£200" were written in the corner of the blank acceptance, and erased. Littledale, J., however, told the jury that the filling up the acceptance for a greater amount than that which was authorized was forgery: *R.* v. *Bateman*, 2 Russ. Cr. 715; 1 Cox, C. C. 186, is to the same effect.

[2] *R.* v. *Blenkinsop*, 1 Den. C. C. 276; 2 Russ. Cr. 724.

[3] *R.* v. *Griffiths*, D. & B. 584. It not easy to see why this case was reserved.

[4] 1 Hawk. P. C. 264.

[5] *Sheppard's Case*, 1 Lea. 226.

[6] *R.* v. *Parkes*, 2 Lea. 775.

[7] *R.* v. *Mahoney*, 6 Cox, C. C. 487; 2 Russ. Cr. 726-7.

[8] *R.* v *Hadfield*, 2 Russ. Cr. 733. This is the well known case of the man who married the girl known as the Beauty of Buttermere.

false document, though the person on whom it was drawn knew and gave credit to the person who drew it.

(10.) [1] A gets B to make his mark to a deed by representing it to be a requisition to a person to stand for a seat in Parliament. A does not make a false document.

(11.) [2] A reads B a document by which an action is agreed to be settled for £9. B agrees to sign it, and pays the £9. A, before B signs it, alters the 9 to 12. A does not make a false document.

(12.) [3] In drawing up B's will, A omits a legacy to C. A does not make a false document.

(13.) [3] In drawing up B's will, A omits a devise of an estate for life to C, whereby the will operates to give D an estate in possession, and not in remainder, on B's death. A makes a false document.

(14.) [4] A, personating B, draws a cheque in his assumed name of B, on a bank with which in his assumed name he had opened a genuine account by the actual payment of money to his credit. A does not make a false document.

(15.) [5] A, with intent to defraud, counterfeits the will of a living person. A is guilty of forgery.

(16.) [6] A, with intent to defraud, counterfeits a bill of exchange on unstamped paper, a stamp being necessary to the validity of such a bill. A commits forgery.

(17.) [7] If a person is indicted for forging a bill of exchange, it must be shewn that the document forged is a bill of exchange.

(18.) [8] A is charged with forging a Bank of England note. If the resemblance of the forged and the real note is sufficient to deceive a common person, the conviction will not be quashed, because in certain important particulars the two documents differ.

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[1] *R.* v. *Collins*, 2 M. & R. 461. But see Mr. Greaves' remarks (2 Russ. Cr. 718, note). Mr. Graves suggests, I think rightly, that this was a case of forgery by an innocent agent, B.

[2] *R.* v. *Chadwick*, 2 M. & R. 545.

[3] 1 Hawkins, P. C. 265. The distinction seems idle, as every omission of a legacy must increase the residue.

[4] Such, I submit, would be the law, though I know of no case in which the precise question has been determined. If the law is otherwise, a person passing by a false name would go half way to forgery every time he signed it. If a man passing by a false name drew many bills and regularly provided for them, and at last drew one for which he could not and ought to have known that he could not provide, I do not think he would be guilty of forgery any more than if he had used his own name. The use of a false name is no doubt a fact from which an intent to defraud may often be inferred, but which is a different matter. See the observations of Sir E. H. East, on *Aickles' Case*, 2 East, P. C. 969.

[5] *Murphy's Case*, 2 East, P. C. 949.

[6] *Hawkeswood's Case*, 2 East, P. C. 955.

[7] See several cases collected in 2 Russ. Cr. 755–61, all of which turn on the question whether peculiarly worded instruments answer the statutory description given in the indictment.

[8] *Elliot's Case*, 2 East, P. C. 951.

(19.) [1] A forges a note in these words: "I promise to pay for self and company of my bank in England." A cannot be convicted of forging a Bank of England note.

Article 357.

"document."

The word document in Article 355 and 356 does not include trade-marks or other signs, though they may be written or printed.

Illustrations.

(1.) [2] A paints a picture, and intending to represent that it was painted by an eminent artist, writes that artist's name in the corner. This may be a cheat, but is not forgery.

(2.) [3] A prints a number of wrappers imitating advertisements in which egg powders were wrapped for sale by B their maker. He encloses spurious egg powders in the wrappers, and sells them. This is not forgery though it is obtaining money by false pretences.

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[1] *Jones's Case*, 2 East, P. C. 952. He might, however, be convicted, if he changed such a document, of obtaining goods by false pretences.

[2] *R.* v. *Cross*, D. & B. 460.

[3] *R.* v. *Smith*, D. & B. 566. It would seem as if in this case the element wanting to complete the offence was the intent to defraud by means of the document, rather than the absence of a document capable of being forged; the offence lay in selling spurious as real powders. The wrappers without the powders could have no effect whatever. The essence of forgery is, that the document itself should be made the instrument of fraud.

CHAPTER XLIV.

PUNISHMENT OF PARTICULAR FORGERIES.

ARTICLE 358.

"UTTER," "RESEMBLE," "FORGE."

[1] IN this chapter the word "utter" includes "offer, dispose of, and put off;" and when it is stated that any uttering is an offence, uttering with knowledge of the character of the thing uttered is intended.

The word "resembling" means "made or apparently intended to resemble."

The word "forge" includes "alter."

[2] "Having in possession" includes knowingly and wilfully having

(*a.*) in the possession or custody of any other person

(*b.*) in any place for the use or benefit of the possessor or any other person.

ARTICLE 359.

FORGERIES PUNISHABLE WITH PENAL SERVITUDE FOR LIFE.

Every one commits felony, and is liable upon conviction thereof to penal servitude for life as a maximum punishment, who

(*a.*) [3] forges, counterfeits, or utters any of the seals mentioned in the note [4] hereto; or

[1] These are mere drafting abridgments. In the Act the words "utter, offer, dispose of, and put off," "resembling and made, or apparently intended to resemble," and "forge and utter" are invariably coupled together. The meaning of the word "utter" was much discussed in *R.* v. *Ion*, 2 Den. 475, in which it was held to be an uttering to produce a forged receipt for inspection, and in order to lead the person to whom it was produced to believe that the person producing it had paid his rents.

[2] s. 45, much abridged.

[3] 24 & 25 Vict. c. 98, s. 1, S.

[4] The Great Seal of the United Kingdom, Her Majesty's Privy Seal, any Privy Signet of Her Majesty, Her Majesty's Royal Sign Manual, any of Her Majesty's seals appointed by the 24th Article of the Union between England and Scotland, to be kept, used, and continued in Scotland, the Great Seal of Ireland and the Privy Seal of Ireland.

forges or counterfeits the stamp or impression of any such seal; or

utters any document or instrument whatsoever having thereon or affixed thereto:

(i.) the stamp or impression of any such forged or counterfeited seal; or

(ii.) any forged or counterfeited stamp or impression resembling the stamp or impression of any of the seals mentioned in the note hereto; or

forges or utters any document or instrument having any of the said stamps or impressions thereon or affixed thereto; or

(*b.*) who forges or utters with intent to defraud,

[1] any transfer of any stock mentioned in the note,[2] any power of attorney for transferring any share or interest in any such stock, or for receiving dividends thereon;

[3] any India bond, or any bond, debenture, or security issued or made under the authority of any Act of Parliament relating to India, or any endorsement thereon or assignment thereof;

[4] any exchequer bill, exchequer bond, or exchequer debenture, any endorsement thereon or assignment thereof, or any receipt or certificate for interest accruing thereon;

[5] any [6] bank note or any endorsement thereon or assignment thereof;

[7] any stock, certificate, or coupon, or any document purporting to be a stock certificate or coupon issued in pursuance of Part V. of the National Debt Act, 1870 (33 & 34 Vict. c. 71), or of any former Act;

[1] 24 & 25 Vict. c. 98, s. 2, S.

[2] "Any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament."

[3] 24 & 25 Vict. c. 28, s. 7, S.

[4] Ibid. s. 8, S.

[5] Ibid. s. 12, S.

[6] "Any bank note or bill of exchange of the governor and company of the Bank of England, or of the governor and company of the Bank of Ireland, or of any other body corporate, company, or persons carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill."

[7] 33 & 34 Vict. c. 58 (incorporated with 24 & 25 Vict. c. 98).

[1] any deed, bond, or writing obligatory, or any assignment thereof at law or in equity, or any name, handwriting, or signature purporting to be that of any attesting witness thereto;

[2] any will, codicil, or testamentary instrument;

[3] any bill of exchange or promissory note, or any acceptance, endorsement, or assignment of either respectively;

[4] any undertaking, order, warrant, authority, or request, for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or security for the payment of money, or for procuring or giving credit, or any endorsement on or assignment of any such document, any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any endorsement on or assignment of any such accountable receipt;

[5] any court roll, or copy of any court roll, relating to any copyhold or customary estate; or

(*c.*) [6] who obliterates, adds to, or utters the crossing on any cheque or draft crossed with the name of a banker, or with two transverse lines with the words "and Company," or any abbreviation thereof, or utters any cheque or draft so dealt with, knowing that it is so dealt with; or

(*d.*) [7] who does any of the following things to any register of births, baptisms, marriages, deaths, or burials authorized or required by law for the time being to be kept (that is to say):

[1] 24 & 25 Vict. c. 98, s. 20, S.

[2] Ibid. s. 21, S.

[3] Ibid. s. 22, S.

[4] Ibid. s. 23, S. As to what is not a receipt; see *R.* v. *French*, L. R. 1 C. C. R. 287. An I. O. U. may be an undertaking for payment of money: *R.* v. *Chambers*, L. R. 1 C. C. R. 340. A turnpike ticket is a receipt: *R.* v. *Fitch*, L. & C. 159. A bank pass book is an accountable receipt: *R.* v. *Smith*, L. & C. 168; *R.* v. *Moody*, L. & C. 173. A guarantee against negligence and dishonesty is an "undertaking for the payment of money:" *R.* v. *Joyce*, L. & C. 576. A pawnbroker's ticket is a warrant for the delivery of goods: *R.* v. *Morrison*, Bell, C. C. 158. Where a dividend warrant is not payable till endorsed by the owner, the endorsement is the warrant: *R.* v. *Antey*, 294. See too *R.* v. *Vivian*, 1 Den. 30.

[5] 24 & 25 Vict. c. 98, s. 30, S.

[6] Ibid. s. 25, S.

[7] Ibid. s. 36, S.

(i.) destroys, defaces, or injures any such register, or permits any such register to be so dealt with; or

(ii.) forges, or fraudulently alters, in any such register any entry relating to any birth, baptism, marriage, death, or burial; or

(iii.) does any of the things above mentioned to any part of any such register, or to any certified copy of any such register, or to any part of any such certified copy; or

(iv.) knowingly and unlawfully inserts, or causes or permits to be inserted in any snch register, or in any certified copy thereof, any false entry of any matter relating to any such fact, or gives any false certificate relating thereto; or

(v.) certifies any writing to be a copy or extract from any such register, knowing such writing, or the part of the register of which it is a copy, to be false in any material particular; or

(vi.) who forges the seal of or belonging to any register office or burial board; or

(vii.) who utters any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or any copy of any entry in any register, knowing the entry to be forged; or

(*e.*) [1] who does any of the following things to any copy of any register required by law to be transmitted to any registrar or other officer (that is to say):

(i.) knowingly and wilfully inserts, or causes or permits to be inserted therein, any false entry of any matter relating to any [2] baptism, marriage, or burial;

(ii.) forges or utters any such copy;

(iii.) knowingly and wilfully signs or verifies any such copy, knowing any part of it to be false;

(iv.) unlawfully destroys, defaces, or injures any such copy;

(v.) unlawfully and for a fraudulent purpose takes any such copy from its place of deposit or conceals it; or

(*f*) [3] who, with intent to defraud,

[1] 24 & 25 Vict. c. 98, s. 37, S.

[2] The word "birth" seems to be wanted here.

[3] 24 & 25 Vict. c. 98, s. 2, S.

[1] demands or endeavours to have any share or interest in stock transferred, or to receive any dividend or money payable in respect thereof, by virtue of any forged power or authority, knowing it to be forged; or

[2] demands or endeavours to obtain or receive any share or interest of or in any stock, as defined in the National Debt Act, 1870 (33 & 34 Vict. c. 71), or to receive any dividend or money payable in respect thereof, by virtue of any forged or altered certificate or coupon, knowing it to be forged; or

(*g*) [3] who commits any felony which was punishable by death before the 1 Wm. 4, c. 66, and which is not otherwise punishable under the 24 & 25 Vict. c. 98, and which consists in forging or uttering any document, or acting under a forged document or personation, or making or being in possession of instruments for making any kind of paper, or other offence of the same nature.

Article 360.

FORGERIES PUNISHABLE WITH FOURTEEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable upon conviction thereof to fourteen years penal servitude as a maximum punishment, who with intent to defraud [4] forges or utters:

(*a.*) [5] any debenture issued under any lawful authority, either within her Majesty's dominions or elsewhere;

[1] See definition in clause (*a*).

[2] 33 & 34 Vict. c. 58, s. 3, S.

[3] 24 & 25 Vict. c. 98, s. 48, S. This section is exceedingly verbose, and is not likely to be put in force. I have therefore greatly abridged it. To judge from the Index to the Revised Statutes, it can apply only to two statutes, 52 Geo. 3, c. 143, s. 6, referring to forging certificates, &c., of redemption of the land tax, and 7 & 8 Geo. 4, c. 53, s. 56, relating to the forgery of instruments to receive money from the Bank of England, on account of the Receiver General of excise, &c. In each case the punishment was originally death, and in each it was reduced to transportation for life by 1 Will. 4, c. 66, s. 1.

[4] 24 & 25 Vict. c. 98, s. 26, S., "shall fraudulently forge or alter or shall" utter; s. 31, "shall forge or fraudulently alter or shall" utter; s. 33, "whoever with intent to defraud shall forge or alter," &c. I see no difference in the meaning of these phrases, nor do I understand why they are varied. The word "forge" in itself implies an intent to defraud.

[5] 24 & 25 Vict. c. 98, s. 26, S.

(*b.*) [1] any [2] document made under any Act in force for the time being relating to the registry of deeds, or the seal or any impression of the seal of any office for the registry of deeds, or anything purporting to be the name, handwriting, or signature of any person to any such document required to be signed by the law for the time being; or

any document mentioned in (*b*) having thereon any such forged stamp, impression, name, handwriting, or signature;

(*c.*) [3] any [4] instrument made, or purporting or appearing to be made, by [5] any of the officers mentioned in the note hereto, or the name, handwriting, or signature of any such officer; or

(*d.*) [6] who [7] draws any bill of exchange or order for the delivery or transfer of [8] goods for, in the name, or on the account of any other person by procuration or otherwise, without lawful authority or excuse, or utters any such bill or order knowing it to be so drawn; or

(*e.*) [9] who [10] demands or obtains any [11] property whatsoever, under, upon, or by virtue of any forged instrument whatsoever, knowing it to be forged, or under, upon, or by virtue of any probate or letters of administration, knowing the [12] will on which such probate or such letters of administra-

[1] 24 & 25 Viet. c. 98, s. 31, S.

[2] any memorial, affidavit, affirmation, entry, certificate, endorsement, document, or writing.

[3] 24 & 25 Vict. c. 98, s. 33, S.

[4] "certificate, report, entry, endorsement, declaration of trust, note, direction, authority, instrument, or writing."

[5] The Accountant-General, or any other the officers of the Court of Chancery in England and Ireland, any judge or officer of the Landed Estates Court in Ireland, every officer of every Court in England or Ireland, every cashier or other officer or clerk of the Governor and Company of the Bank of England or Ireland.

[6] 24 & 25 Vict. c. 98 s. 24, S.

[7] "draws, makes, signs, accepts, or indorses."

[8] "any bill of exchange or promissory note, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money." A document which is in form a receipt may be in substance a warrant, &c. *R.* v. *Kay*, L. R. 1 C. C. R. 29.

[9] 24 & 25 Vict. c. 98, s. 38, S.

[10] "demands, receives, or obtains, or causes or procures to be delivered or paid to any person, or endeavours" to do any such thing.

[11] chattel, money, security for money, or other property whatsoever.

[12] testament, codicil, or testamentary writing.

tion were obtained to have been forged, or knowing the probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit.

ARTICLE 361.

FORGERIES PUNISHABLE WITH SEVEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable upon conviction thereof to seven years penal servitude as a maximum punishment, who

(*a.*) [1] forges the seal of any Court of record; or

(*b.*) [2] forges or utters any process of any Court of justice whatever, or

serves or enforces any such forged process knowing it to be forged, or delivers, or causes to be delivered, to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any Court of law or equity, or a copy thereof, or

acts, or professes to act, under any such false process knowing (in any such case) such process to be false; or

(*c.*) [3] forges or utters any copy or certificate of any record, or utters any such copy or certificate having thereon any forged name, handwriting, or signature; or

(*d.*) [4] forges or utters any [5] original document whatever

[1] Clause (*a*) represents part of 24 & 25 Vict. c. 98, s. 28, S., which occurs in the middle of the section. The statute says nothing in this case of forging the stamp or impression of such seals.

[2] Clause (*b*) represents the effect of that part of sect. 27, S., which makes it an offence, *inter alia*, to forge the process of certain Courts named, combined with that part of sect. 28 which makes it an offence to forge the process of any other Court than those mentioned in sect. 27, and to serve the forged process of any Court whatever. These sections are singularly cumbrous and ill-arranged, besides being intolerably wordy. A somewhat similar provision as to County Courts occurs in 9 & 10 Vict. c. 95, s. 57, see *R.* v. *Richmond*, Bell, 142, and *R.* v. *Evans*, D. & B. 236.

[3] 24 & 25 Vict. c. 98, s. 28, S.

[4] Ibid. s. 27, S.

[5] "record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognizance, cognovit, actionem, or warrant of attorney, or any original document whatsoever of or belonging to any Court of record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever" of the other Courts named. As the Courts of Equity and Admiralty in England now form divisions of the High Court, the distinction between the different classes of documents would seem to have ceased to exist.

of any Court which, on the 6th of August, 1861, was a Court of record, of equity, or of admiralty in England or Ireland, or any document, or copy of a document, used, or intended to be used, as evidence in any such Court; or

(*e*) [1] who, being the clerk of any Court or other officer, or deputy of the clerk or officer having custody of the records of any Court, utters a false copy or certificate of any record; or

(*f.*) [2] who, not being such officer or deputy, signs or certifies any copy of any record or certificate as such officer or deputy; or

(*g.*) [3] who forges or utters any instrument, whether written or printed in whole or in part, made evidence by any Act of Parliament in force for the time being, and not mentioned specifically in any other article of this chapter; or

[4] any summons, conviction, order, or warrant of any justice of the peace, or any recognizance purporting to have been entered into before any person authorized to take it, or any examination, deposition, affidavit, affirmation, or solemn declaration taken or made before any justice of the peace; or

[5] any licence of or certificate for marriage; or

[6] the [7] signature of a witness attesting the execution of any power of attorney or other authority to transfer any interest in any stock mentioned in Article 359 (*b*) or (*f*), or to receive any dividend or money payable in respect thereof.

(*h.*) [8] who, being a clerk, officer, or servant or other person employed by the Bank of England or Ireland, knowingly and with intent to defraud makes out or delivers any dividend warrant or warrant for the payment of any annuity, interest, or money payable at either of the said banks for an

[1] 24 & 25 Vict. c. 98, s. 28, S.
[2] Ibid. s. 28, S.
[3] Ibid. s. 29, S.
[4] Ibid. s. 32, S.
[5] Ibid. s. 35, S.
[6] Ibid. s. 4, S.
[7] "any name, handwriting, or signature purporting to be the name, &c., of."
[8] 24 & 25 Vict. c. 98, s. 6, S.

amount greater or less than that to which the person on whose behalf such warrant is made out is entitled;

Article 362.

MAKING OR POSSESSION OF PAPER, ETC., FOR FORGING BANK NOTES PUNISHABLE WITH FOURTEEN YEARS PENAL SERVITUDE.

Every one commits felony and is liable on conviction thereof to fourteen years penal servitude as a maximum punishment, who does any of the following things without lawful authority or excuse, the proof whereof lies upon him (that is to say):

(*a*) [1] who purchases or receives from any person, or has in his custody or possession any forged [1] or blank bank note, knowing it to be forged; or

(*b.*) [2] who makes, uses, sells, exposes to sale, utters, or knowingly has in his custody or possession any [3] bank-note paper, or

any frame, mould, or instrument for making such paper, or

who by any act or contrivance causes the numerical sum or amount of any bank note [4] in a word or words in Roman letters to appear visible in the substance of the paper whereon the same is written or printed, or

who causes any of the words or marks mentioned in the definition of bank-note paper given in the footnote to appear in the substance of any paper.

[5] Provided that nothing in this Article is to prevent any

[1] 24 & 25 Vict. c. 98, s. 13.

[2] Ibid. s. 14.

[3] "Bank note paper" means any paper whatsoever with the words "Bank of England," or "Bank of Ireland," or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof, in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper, or with any device or distinction peculiar to, and appearing in, the substance of the paper used by the Banks of England and Ireland respectively, for any notes, bills of exchange, or bank post bills, of such banks respectively.

[4] "Bank note, bank bill of exchange, or bank post bill."

[5] 24 & 25 Vict. c. 98, s. 15.

person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in numerical figures denoting the amount thereof in pounds sterling, appearing visible in the substance of the paper upon which the same is written or printed;[1]

or from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of water-marks visible in the substance of the paper, not being bar lines or laying wire lines, provided that they are not so contrived as to form the ground-work or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the water-marks of the paper used by the Bank of England or the Bank of Ireland respectively; or

(*c.*) [2] who engraves or makes in any manner, upon any plate or other thing, any note purporting to be a [3] bank-note, or blank bank note, or any part thereof, or any name, word, or character resembling any subscription to any bill of exchange or promissory note issued by any company or person mentioned in the note; or

uses any such plate or thing, or any other instrument or device for making or printing any such note, [3] or part thereof, or knowingly has in his possession any such plate, thing, or instrument, or device; or

knowingly utters or has in his possession any paper on which is made or printed any [3] blank bank note, or [3] part of a

[1] This probably means "any note in the substance of the paper of which there visibly appear either words or figures expressing the amount in guineas, or figures denoting the amount thereof in pounds sterling."

It may possibly mean "nothing in this section prevents any person from issuing any note having the amount expressed in guineas, whatever kind of paper he may use for the purpose, or any note having the amount thereof expressed in numerical figures, denoting its value in pounds sterling, and appearing visible, &c."

[2] 24 & 25 Vict. c. 98, s. 16, S.

[3] "Any promissory note, bill of exchange, or bank post bill, or part of a promissory note, bill of exchange, or bank post bill, purporting to be a bank note, bank bill of exchange, or bank post bill of the governor and company of the Bank of England, or of the governor and company of the Bank of Ireland, or of any other body corporate, company, or persons carrying on the business of bankers, or to be a blank bank note, &c. (as before inserting 'blank' before 'bank.')" It is almost impossible to be quite sure whether these sections are quite correctly stated or not, the phraseology is quite bewildering.

bank-note, or any word, name, or character resembling any subscription thereto; or

(*d.*) [1] who engraves or makes upon any material whatever [2] any word, number, figure, device, character, or ornament, the impression taken from which resembles [3] any part of a [3] bank note; or

uses or knowingly has in his possession or custody [2] any material or instrument or device for impressing or making any such impression as aforesaid upon any paper or other material; or

[2] knowingly utters or has in his custody or possession any paper or other material upon which there is any such impression; or

(*e.*) [4] who makes or uses any frame, mould, or instrument for the manufacture of paper with the name or firm of any [5] bank (other than the Bank of England and the Bank of Ireland) appearing visible in the substance of the paper; or

knowingly has in his custody or possession any such frame, mould, or instrument; or

makes, uses, sells, exposes to sale, utters, or knowingly has in his custody or possession any such paper; or

by any act or contrivance causes any such name to appear visible in the substance of the paper upon which it is printed or written; or

(*f.*) [6] who engraves or makes upon any plate or upon any [7] material any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any such document in any language, and, whether under seal or not, purporting to be a document of any foreign prince or state, or of any minister or officer in the service of any such prince or state, or of any corporation recog-

[1] 24 & 25 Vict. c. 98, s. 17, S.

[2] "Any plate whatsoever, or any wood, stone, or other material."

[3] See note (3), *ante*, p. 283.

[4] 24 & 25 Vict. c. 98, s. 18, S.

[5] "body corporate, company, or person carrying on the business of bankers."

[6] 24 & 25 Vict. c. 98, s. 19, S. Taking a positive impression of an Austrian note on glass by photography is a "making" within this section: *R.* v. *Rivaldi*, L. & C. 330.

[7] "Upon any wood, stone, or other material."

nised by any such prince or state, or of any person or company of persons resident out of her Majesty's dominions; or

uses or has in his possession any plate or material upon which any such document, or any part thereof, is engraved; or

knowingly utters or has in his custody or possession any paper upon which any part of any such document is made or printed.

Article 363.

UTTERING FALSE DIVIDEND WARRANTS, POSSESSION OF FORGED PAPER, &c., FOR VARIOUS PURPOSES, SEVEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable upon conviction thereof to a maximum punishment of seven years penal servitude, or

(*a.*) [1] who, without lawful authority or excuse (the proof whereof lies upon the party accused), makes, causes, or procures to be made, or aids or assists in making, or knowingly has in his possession,

(i.) any paper in the substance of which appears any thread or [2] device, or any part of any thread or device, peculiar to and appearing in the substance of paper [3] used for [4] exchequer bills, and intended to imitate the same;

(ii.) [5] any frame, mould, or instrument having therein any such [6] device;

(iii.) [7] any machinery for working any thread into the sub-

[1] 24 & 25 Vict. c. 98, s. 10, S.

[2] "words, letters, figures, marks, lines, threads, or other devices."

[3] Provided, or to be provided or used.

[4] "Exchequer bills, bonds, or debentures."

[5] 24 & 25. Vict. c. 98, s. 9, S.

[6] "Device" here has the same meaning as in note 2, except the word "thread."

[7] 24 & 25 Vict. c. 98, part of s. 9. The language thus paraphrased is exceedingly clumsy: "any . . . instrument having therein any words, &c., or any machinery for working any threads, &c., or any such thread, *and intended to* imitate such words, &c." The words in italics are hardly grammatical, but I suppose they mean what is stated in the text.

stance of any paper, or any such thread, such instrument, machinery, or thread being intended to imitate any such device

(iv.) [1] any plate peculiarly employed for printing exchequer bills, or any die or seal peculiarly used for preparing any such plate or for sealing exchequer bills, or any plate, die, or seal intended to imitate any such plate, die, or seal; or

(*b.*) [2] who causes, or assists in causing, any such device, or any part of any such device as aforesaid, and intended to imitate the same to appear in the substance of any paper whatever; or

(*c.*) [3] who takes, or assists in taking, any impression of any such plate, die, or seal as is mentioned in clause (*a*) (iv.), [4] or purchases or receives, or knowingly has in his custody or possession, any such plate, die, or seal; or

(*d.*) [5] who purchases or receives, or knowingly has in his possession or custody, any paper provided by or under the direction of the Commissioners of Inland Revenue or of the Treasury for the purpose of being used as exchequer bills before such paper is duly stamped, signed, and issued for public use.

Article 364.

TRADE-MARKS DEFINED.

A trade-mark is

(*a.*) [6] A [7] mark lawfully used by any person to denote any chattel to be an article or thing of the manufacture, workmanship, production, or merchandise, of such person, or to be an article or thing of any peculiar or particular description made or sold by such person;

(*b.*) any [8] mark or sign which in pursuance of any statute in force for the time being relating to registered designs is to be put or placed upon or attached to any chattel or article

[1] 24 & 25 Vict. c. 98, s. 9, S.
[2] Ibid. s. 10, S.
[3] Ibid. s. 10, S.
[4] Ibid. s. 11.
[5] Ibid. s. 11.
[6] 25 & 26 Vict. c. 88, s. 1.
[7] "Name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark."
[8] "Name, signature, word, letter, number, figure, mark, or sign."

during the existence or continuance of any copyright or other sole right acquired under the provision of such statutes or any of them.

Article 365.

FORGING TRADE MARKS.

Every one commits a misdemeanor, and [1]is liable upon conviction thereof to a maximum punishment of two years imprisonment and hard labour, with a fine and imprisonment until the fine (if any) has been paid, who does any of the following things with intent to defraud or to enable another to defraud any person (that is to say):—

(*a.*) Forges or counterfeits any trade-mark;

(*b.*) applies any trade-mark, or any forged or counterfeited trade-mark, to any chattel or article

not being the [2]merchandise of any person [3]denoted or intended to be denoted thereby, or

not being the [2]merchandise of any person whose trade-mark is so forged or counterfeited;

(*c.*) applies any trade-mark or any forged or counterfeited trade-mark to any chattel or article not being the particular or peculiar description of [2]merchandise denoted or intended to be denoted by such trade-mark or by such forged and counterfeited trade-mark;

(*d.*) applies any trade-mark or any forged or counterfeited trade-mark to any [4]thing intended for any purpose of trade or manufacture, or in, on, or with which any chattel or article is intended to be sold, or is sold or offered or exposed for sale;

[1] 25 & 26 Vict. c. 88, s. 14. Clauses (*a*), (*b*), and (*c*) represent sect. 2. Clauses (*d*), (*e*), (*f*), and (*g*) represent sect. 3. Clause (*h*) gives the effect of the words, "Cause or procure to," &c., which are inserted in every statement of sects. 2 and 3, and also the effect of sect. 13. The Act is exceptionally verbose and lengthy. Sect. 5 contains a definition of forgery, which appears to me quite superfluous.

[2] "Manufacture, workmanship, production, or merchandise."

[3] "Denoted or intended to be denoted by such trade-mark, or denoted or intended to be denoted by such forged or counterfeited trade-mark."

[4] "Cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing."

(*e.*) incloses or places any chattel or article in, upon, under, or with any [1]thing to which any trade-mark has been falsely applied, or to which any forged or counterfeit trade-mark has been applied;

(*f.*) applies or attaches any chattel or article to any case, cover, reel, ticket, label, or other thing to which any trade-mark has been falsely applied, or to which any false or counterfeit trade-mark has been applied;

(*g.*) incloses, places, or attaches any chattel or article in, upon, under, with, or to any [1]thing having thereon any trade-mark of any other person;

(*h.*) [2]causes or procures to be committed any of the offences defined in this Article, or aids, abets, or counsels the commission of any of them.

Every person committing any such misdemeanor as aforesaid forfeits to her Majesty—

all chattels and articles to which any such trade-mark or counterfeit trade-mark is applied or caused or procured to be applied;

every instrument for applying any such trade-mark or counterfeit trade-mark in his possession or power;

the chattels and articles and the things mentioned in clauses (*d*), (*e*), and (*g*), and all similar things made to be used in like manner in his possession or power.

ARTICLE 366.

FORGERY AT COMMON LAW, MISDEMEANOR.

[3]Every one commits a misdemeanor who forges any document by which any other person may be injured, or utters any such document knowing it to be forged with intent to defraud, whether he effects his purpose or not.

Illustrations.

The forgery or uttering of any of the following documents is a misdemeanor:—

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[1] See note, (4), *ante*, p. 287.

[2] 25 & 26 Vict. c. 88, s. 13.

[3] *R.* v. *Ward*, East, P. C. 861; *R.* v. *Sharman*, Dear. 285 (overruling *R.* v. *Boult*, 2 C. & K. 604).

[1] An order from a magistrate to a gaoler to discharge a prisoner as upon bail being given.

[2] A certificate of character to induce the Trinity House to enable a seaman to act as master.

[3] Testimonials whereby the offender obtained an appointment as a police constable.

[4] The like with intent to obtain the office of a parish schoolmaster.

[5] A certificate that a liberated convict was gaining his living honestly to obtain an allowance.

[1] *R.* v. *Harris*, R. & M. 393.
[2] *R.* v. *Toshack*, 1 Den. C. C. 492.
[3] *R.* v. *Moah*, D. & B. 550.
[4] *R.* v. *Sharman*, Dear. C. C. 285.
[5] *R.* v. *Mitchell*, 2 F. & F. 44,

CHAPTER XLV.

PERSONATION.

ARTICLE 367.

PERSONATION.

EVERY one commits felony and is liable upon conviction thereof to penal servitude for life as a maximum punishment, who falsely and deceitfully personates

(*a.*) [1] any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property;

(*b.*) [2] any owner of any share or interest of or in any stock, annuity, or other public fund transferable at the Bank of England or the Bank of Ireland;

(*c.*) any owner of any share or interest of or in the capital stock of any body corporate, company, or society established by charter or by virtue of an Act of Parliament;

(*d.*) any owner of any dividend or money payable in respect of any such share or interest as aforesaid,

and who thereby (in the case of clauses (*b*) (*c*) and (*d*)) transfers or endeavours to transfer any share or interest belonging to such owner, or thereby receives or endeavours to receive any money due to any such owner as if such offender were the true and lawful owner.

ARTICLE 368.

ACKNOWLEDGING RECOGNIZANCE ETC., IN FALSE NAME.

[3] Every one commits felony and is liable upon conviction

[1] 37 & 38 Vict. c. 36, s. 1, S.

[2] 24 & 25 Vict. c. 98, s. 3, S. Besides these general enactments there are various special Acts punishing personation in particular cases. See 33 & 34 Vict. c. 58, s. 21, as to personation of stock-holders; 26 & 27 Vict. c. 73, s. 111, as to personating persons interested in India stock; 30 & 31 Vict. c. 131, s. 35, as to personation of persons interested in joint stock companies' stock. The other enactments as to personation of voters, &c., are enumerated in Archbold, 628.

[3] 24 & 25 Vict. c. 98, ss. 3, 4, S.

thereof to seven years penal servitude as a maximum punishment, who without lawful authority or excuse (the proof of which is on the party accused) acknowledges any recognizance or bail, or any cognovit actionem, or judgment, or any deed or other instrument before any Court, judge, or other person lawfully authorized in that behalf.

CHAPTER XLVI.

OFFENCES RELATING TO THE COIN.

[1] ARTICLE 369.

INTERPRETATION OF TERMS.

IN this Chapter the following words and expressions are used in the following senses :—

[2] "Current," applied to coin, means coin coined in any of Her Majesty's mints or lawfully current by virtue of any proclamation or otherwise in any part of her Majesty's dominions, whether within the United Kingdom or without.

"Copper," applied to coin, includes bronze or mixed metal and every other kind of coin inferior in value to silver.

"Counterfeit coin" means coin not genuine, but resembling, or apparently intended to resemble, or pass for genuine coin; and includes genuine coin prepared or altered so as to resemble or pass for coin of a higher denomination.

"Gild" and "silver," as applied to coin, include casing with gold or silver respectively, and washing and colouring by any means whatsoever with any wash or materials capable of producing the appearance of gold or silver respectively.

"Utter" includes "tender" and "put off."

"Having in possession" includes knowingly and wilfully having

(*a*) in the possession or custody of any other person; or

(*b*) in any place for the use or benefit of the possessor or any other person.

ARTICLE 370.

COINING AND POSSESSION OF INSTRUMENTS FOR COINING—PENAL SERVITUDE FOR LIFE.

Every one commits felony and is liable upon conviction thereof to penal servitude for life as a maximum punishment,

[1] 24 & 25 Vict. c. 99.

[2] Sect. 1. The interpretation clause is rather clumsy, but the text will be found to represent it correctly, though as to the word "possession" in an abridged shape·

(*a.*) [1] who makes any counterfeit gold or silver current coin; or

(*b.*) [2] who gilds or silvers any counterfeit current coin; or

(*c.*) [2] who gilds or silvers any piece of metal or mixture of metals whatever of a fit size and figure to be coined, with intent that it shall be coined into counterfeit current gold or silver coin; or

(*d.*) [2] who gilds, files, or alters any current silver or copper coin with intent to make it resemble or pass for current gold or silver coin; or

(*e.*) [3] who buys, sells, receives, pays, or puts off any counterfeit gold or silver current coin at a lower rate than it imports or was apparently intended to import, or offers to do any such thing, [4] whether or not such coin was in a fit state to be uttered, and whether or not the counterfeiting thereof was finished; or

(*f.*) [5] who imports or receives into the United Kingdom from beyond the seas any counterfeit current coin knowing it to be counterfeit; or

(*g.*) [6] who makes, mends, begins or proceeds to make or mend, buys, sells, or has in his custody or possession,

(i.) any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which is made or impressed, or which is adapted and intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign state, prince, or country, or any part of either side thereof, knowingly; or

(ii.) any edger, edging or other tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling the marks on the edge of such coin as aforesaid, knowing the same to be so adapted and intended; or

(iii.) any press for coinage, or any cutting engine for cutting,

[1] 24 & 25 Vict. c. 99, s. 2, S.
[2] Ibid. s. 3, S.
[3] Ibid. s. 6, S.
[4] Ibid. s. 30.
[5] Ibid. s. 7, S.
[6] Ibid. s. 24, S.

by force of a screw or any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been, or to be intended to be, used for or in order to counterfeiting any such coin as aforesaid; or

(*h.*) [1] who knowingly conveys out of any of Her Majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press, or engine used or employed in coining, or any useful part of any of the said things, or any coin, bullion, metal, or mixture of metals.

[2] None of the acts specified in (*e*), (*f*), (*g*), and (*h*) is an offence unless it is done without lawful authority or excuse, to be proved by the party accused.

ARTICLE 371.

CLIPPING—PENAL SERVITUDE FOR FOURTEEN YEARS.

[3] Every one commits felony and is liable on conviction to a maximum punishment of fourteen years penal servitude, who impairs, diminishes, or lightens any current gold or silver coin with intent that when so dealt with it may pass as current gold or silver coin.

ARTICLE 372.

COINING COPPER OR FOREIGN MONEY—PENAL SERVITUDE FOR SEVEN YEARS.

Every one commits felony and is liable to seven years penal servitude as a maximum punishment,

(*a.*) [4] who counterfeits the Queen's current copper coin; or

(*b.*) [4] who (without lawful authority or excuse (the proof whereof lies upon him)) knowingly makes or mends, or begins or proceeds to make or mend, or buy or sell, or have

[1] 24 & 25 Vict. c. 99, s. 25, S.

[2] A orders a die for coining counterfeit half-crowns (see clause (*g*) (i)) from B. B communicates with the Mint, and is permitted by them to finish and deliver the die to A. A receives it. A has the die in his possession without lawful excuse: *R.* v. *Harvey*, L. R. 1 C. C. R. 285.

[3] 24 & 25 Vict. c. 99, s. 4, S.

[4] Ibid. s. 14.

in his custody or possession, any instrument, tool, or engine adapted and intended for counterfeiting any of the Queen's current copper coin; or,

(*c.*) [1] who buys, sells, receives, pays, or puts off any counterfeit copper coin at a lower rate or value than the same imports or was apparently intended to import; or

(*d.*) [2] who makes counterfeit gold or silver coin of any foreign prince, state, or country; or

(*e.*) [3] who brings or receives into the United Kingdom counterfeit gold or silver coin of any foreign prince, state, or country, knowing the same to be counterfeit, without lawful authority or excuse, to be proved by the party accused, [4] whether or not such coin was in a fit state to be uttered, and whether or not the counterfeiting thereof was finished; or

(*f.*) [5] who has in his custody or possession any filings or clippings, gold or silver bullion, or gold or silver in dust or solution, obtained by impairing current gold or silver coin, knowing it to have been so obtained.

Article 373.

COINING FOREIGN COPPER MONEY—PENAL SERVITUDE FOR SEVEN YEARS.

[6] Every one commits a misdemeanor who makes any counterfeit copper coin of any foreign state; the maximum punishment is, for the first offence, one year's imprisonment without hard labour; for the second offence, after conviction of the first, seven years penal servitude.

Article 374.

UTTERING AND POSSESSING WITH INTENT TO UTTER.

Every one commits a misdemeanor, or in case (*d*) a felony, and is liable to a maximum punishment of one year's imprisonment and hard labour in case (*a*), two years imprison-

[1] 24 & 25 Vict. c. 99, s. 14, S.
[2] Ibid. s. 19, S.
[3] Ibid. s. 18, S
[4] Ibid. s. 30.
[5] Ibid. s. 5, S.
[6] Ibid. s. 22, S.

ment and hard labour in case (*b*), five years penal servitude in case (*c*), and penal servitude for life in case (*d*),

(*a*.) [1] who utters counterfeit current gold or silver coin, knowing it to be counterfeit; or,

(*b*.) [2] who at the time of such uttering as is specified in clause (*a*) has in his custody or possession any other piece of such counterfeit coin, or who, on the same day, or on any of the ten days next ensuing, utters any such counterfeit coin, knowing the same to be counterfeit; or,

(*c*.) [3] who has in his possession three or more pieces of counterfeit current gold or silver coin, with intent to utter them or any of them; or,

(*d*.) [4] who commits any of the above-mentioned offences, after having been previously convicted at any time of any one of them, or of any felony relating to the coin.

ARTICLE 375.

UTTERING BASE COPPER OR FOREIGN COIN.

Every one commits a misdemeanor

(*a*.) [5] who, without lawful authority or excuse to be proved by him, exports or puts on board any vessel for the purpose of being exported from the United Kingdom any counterfeit current coin whatever, knowing the same to be counterfeit; or,

(*b*.) [6] who utters any counterfeit current copper coin, knowing it to be counterfeit; or,

(*c*.) [6] who has in his possession three or more pieces of such counterfeit coin, knowing the same to be false and with intent to utter any of them; or,

(*d*.) [7] who, with intent to defraud, utters as current gold or silver coin any coin which is not such coin, or any medal or piece of metal or mixed metal resembling in size, figure,

[1] 24 & 25 Vict. c. 99, s. 9, S.
[2] Ibid. s. 10, S.
[3] Ibid. s. 11, S.
[4] Ibid. s. 12, S.
[5] Ibid. s. 8, S.
[6] Ibid. s. 15, S.
[7] Ibid. s. 13, S. As to the degree of resemblance necessary to bring a medal within this section, see *R.* v. *Robertson*, L. & C. 604.

and colour, the current coin as which it is uttered, but being of less value; or,

(*e.*) [1] who defaces any current coin whatever by stamping thereon any names or words, whether such coin is or is not thereby diminished or lightened; or,

(*f.*) [2] who utters any counterfeit gold or silver coin of any foreign prince, state, or country, knowing it to be counterfeit; or,

(*g.*) [3] who has in his custody or possession more than five pieces of counterfeit gold or silver coin or any counterfeit copper coin of any foreign prince, state, or country, without lawful authority or excuse to be proved by such person.

[4] The offences defined in clauses (*b*), (*d*), and (*f*) are complete, whether or not the coin was in a fit state to be uttered, and whether or not the counterfeiting thereof was finished.

The maximum punishment for the offence in clause (*a*) is two years imprisonment and hard labour; for each of the offences in clauses (*b*), (*c*), (*d*), and (*e*), one year's imprisonment with hard labour.

The maximum punishment for the offence in clause (*f*) is, for the first offence six months imprisonment with hard labour; [5] for a second offence, after a previous conviction therefor, two years imprisonment and hard labour; [5] and after two previous convictions the offence is felony, and the offender is liable to penal servitude for life as a maximum punishment.

The punishment for the offence numbered (*g*) is a fine not exceeding forty shillings, and not less than ten shillings for every such piece of money, half to go to the informer, and half to the poor of the parish where the offence is committed, and forfeiture of the counterfeit coins, which are to be destroyed. In default of payment, the offender may be imprisoned with hard labour for a maximum period of three months. The proceeding is to be before any justice of the peace.

[1] 24 & 25 Vict. c. 99, s. 16.
[2] Ibid. s. 20.
[3] Ibid. ss. 22, S., 23.
[4] Ibid. s. 30.
[5] Ibid. s. 21, S.

CHAPTER XLVII.

MALICIOUS INJURIES TO PROPERTY.

ARTICLE 376.

[1] BURNING SHIPS OF WAR, ETC.—FELONY—DEATH.

EVERY one is guilty of felony, and must upon conviction thereof be sentenced to death, who either within this realm or in any of the islands, countries, ports, or places thereto belonging,

wilfully and maliciously sets on fire, burns, or otherwise destroys; or

causes to be set on fire or burnt or otherwise destroyed; or

aids, procures, abets, or assists in the setting on fire or burning or otherwise destroying

(*a.*) any of her Majesty's ships or vessels of war, whether afloat or building or begun to be built in any of her Majesty's dockyards, or building or repairing by contract in any private yards for the use of her Majesty; or

(*b.*) any of her Majesty's arsenals, magazines, dockyards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto; or

(*c.*) any timber or materials there placed for building, repairing, or fitting out of ships or vessels; or

(*d.*) any of her Majesty's military, naval, or victualling stores or other ammunition of war; or

(*e.*) any place or places where any such military, naval, or victualling stores or other ammunition of war is, are, or shall be kept, placed, or deposited.

[2] ARTICLE 377.

ARSON, ETC.—PENAL SERVITUDE FOR LIFE.

Every one commits felony, and is liable on conviction

[1] 12 Geo. 3, c. 24. The punishment is not altered either by 7 & 8 Geo. 4, c. 28, or 1 Vict. c. 91. The Court, however, may order the judgment of death to be recorded: 4 Geo. 4, c. 48.

[2] 24 & 25 Vict. c. 97.

thereof to penal servitude for life as a maximum punishment, who unlawfully and maliciously does any of the following acts (that is to say):—

(*a.*) [1] who [2] sets fire to any [3] place of divine worship;

[4] or to any dwelling-house, any person being therein;

[5] or to any [6] private building, whether in the possession of the offender or of any other person, with intent to injure or defraud any person;

[7] or to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, port, dock, harbour, or canal, or other navigation;

[8] or to any [9] public building;

[10] or to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, any cultivated vegetable produce, furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark;

[11] or to any mine of coal, cannel coal, anthracite, or other mineral fuel;

[1] 24 & 25 Vict. c. 97, s. 1, S. W.

[2] As to what constitutes "setting fire," it is not necessary that flame should be seen: *R.* v. *Stallion*, 1 Moo. 398; but it is not sufficient that wood should be scorched black: *R.* v. *Russell*, Car. & M. 541. It is sufficient if the wood has been at a red heat: *R.* v. *Parker*, 9 C. & P. 45. I suppose the question is whether the thing burnt has or has not begun to be decomposed by the action of fire.

[3] "Church, chapel, meeting-house, or other place of divine worship."

[4] 24 & 25 Vict. c. 97, s. 2, S. W.

[5] Ibid. s. 3, S. W.

[6] Private building means "house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed fold, farm building, building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof." Many cases are collected in Fisher's Digest, 2318–2321 as to the buildings which fall under one or the other of these terms. But they are all nisi prius rulings, and the matter is too minute to be referred to in detail here.

[7] 24 & 25 Vict. c. 97, s. 4, W.

[8] Ibid. s. 5, W.

[9] Public building means building other than such as are before mentioned, belonging to the Queen or to any county, riding, division, city, borough, poor law union, parish or place, or to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution.

[10] 24 & 25 Vict. c. 97, s. 17, S. W.

[11] Ibid. s. 26, S. W.

[1] or to any ship, whether in a complete or unfinished state; or

(*b.*) [2] who by the explosion of gunpowder or other explosive substance throws down or damages the whole or any part of any dwelling-house any person being therein, or of any building so as to endanger the life of any person; or

(*c.*) [3] who cuts, breaks, destroys, or damages with intent to destroy or render useless any of the [4] goods or articles mentioned below being in any stage of manufacture, or any [5] tool or machinery employed in manufacturing or preparing such goods, or who by force enters any house, shop, building, or place with intent to commit any such offence; or

(*d.*) [6] who breaks down, cuts down, or otherwise damages or destroys any sea bank, or sea wall, or the bank, dam, or wall of or belonging to any water [7] whereby any land or building shall be, or shall be in danger of being, overflowed or damaged; or

(*e.*) [8] who [9] destroys any [10] work belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal; or

(*f.*) [11] who pulls or throws down, or in anywise destroys

[1] 24 & 25 Vict. c. 97, s. 42, S. W.

[2] Ibid. s. 9, S. W.

[3] Ibid. s. 14, S. W.

[4] Any goods or article of silk, woollen, linen, cotton, hair, mohair or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or any frame work, knitted piece, stocking, hose or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or any warp or shute of any such article, or any frame work, knitted piece, stocking, hose, or lace.

[5] Any "loom, frame, machine, engine, rack, tackle, tool or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles."

[6] 24 & 25 Vict. c. 97, s. 30, S. W.

[7] Water means river, canal, drain, reservoir, pool, or marsh.

[8] 24 & 25 Vict. c. 97, s. 30, S. W.

[9] Throws, breaks, or cuts down, levels, undermines, or otherwise destroys.

[10] Work = quay, wharf, jetty, lock, sluice, flood gate, weir, tunnel, towing path, drains, watercourse, or other work.

[11] 24 & 25 Vict. c. 97, s. 33, S. W.

any bridge (whether over any stream of water or not) or any viaduct or aqueduct over or under which any highway, railway, or canal passes; or

(*g.*) [1] who does any injury with intent and so as thereby to render dangerous or impassable any such bridge, viaduct, or aqueduct, or any highway, railway, or canal passing over or under the same or any part thereof; or

(*h.*) [2] who with intent to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using any railway;

puts, places, casts, or throws [3] anything whatever across any railway; or

takes up, removes, or displaces any rail, sleeper, or other thing belonging to any railway; or

turns, moves, or diverts any points or other machinery belonging to any railway; or

makes, shows, hides, or removes any signal or light upon or near to any railway; or

does, or causes to be done, any other matter or thing; or

(*i.*) [4] who casts away or in anywise destroys any ship or vessel whether complete or in an unfinished state; or

(*j.*) [5] who casts away or in anywise destroys any ship or vessel with intent thereby to prejudice the owner or part owner of such ship or vessel or of any goods on board the same, or any insurer of the ship, freight, or goods; or

(*k*) [6] who with intent [7] to bring any ship, vessel, or boat into danger, masks, alters, or removes any light or signal, or exhibits any false light or signal; or

[1] 24 & 25 Vict. c. 97, s. 33, S. W.

[2] 24 & 25 Vict. c. 97, s. 35, W. The whole section might be expressed thus: "who attempts to obstruct," &c.

[3] "Any wood, stone, or other matter or thing."

[4] 24 & 25 Vict. c. 97, s. 42, S. W.

[5] Ibid. s. 43, S.W. This section and s. 42 are like dividing theft into two offences, theft, and theft with intent to injure the owner of the stolen goods, each offence being punished in the same way.

[6] 24 & 25 Vict. c. 97, s. 47, S. W.

[7] The word "maliciously" is here omitted, though "unlawfully" is retained The reason, no doubt, is that one particular form of malice, viz., an intent to bring a ship into danger, is specified, but it is singular that in the latter part of the same section (s. 35) the words "unlawfully and maliciously" are used, though a specific malicious intent, viz., the injury of railway carriages is mentioned.

(*l.*) [1] does anything tending to the immediate loss or destruction of any ship, vessel, or boat, for which no punishment is otherwise provided by the 24 & 25 Vict. c. 97.

Article 378.

ARSON, ETC.—FOURTEEN YEARS PENAL SERVITUDE.

Every one commits felony, and is liable upon conviction thereof to fourteen years penal servitude as a maximum punishment, who unlawfully and maliciously does any of the following things (that is to say),

(*a.*) [2] who sets fire to any building other than those mentioned in [3]Article 377 (*a*) (whether finished or unfinished);[4] or

(*b.*) [5] who sets fire to anything in, against, or under any building under such circumstances that if the building were thereby set fire to, the offence would amount to felony; or

(*c.*) [6] who sets fire to any crop of hay, grass, corn, grain, pulse, or cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing; or

(*d.*) [7] who attempts by any overt act to set fire to any

[1] 24 & 25 Vict. c. 97, s. 47, S. W.

[2] Ibid. s. 6, W.

[3] If it were not for the arbitrary and practically unimportant distinction between the punishment for this offence, and for the offences defined in Art. 377, clause (*a.*), the following enactment would include them all:—"Whoever sets fire to any building whatever shall be liable to penal servitude for life as a maximum punishment." This would reduce six cumbrous sections, filling a page of Chitty's Statutes, to two lines.

[4] *R.* v. *Manning*, L. R. 1 C. C. R. 338. It is a question for a jury what constitutes a building.

[5] 24 & 25 Vict. c. 97, s. 7, W. In *R.* v. *Child*, L. R. 1 C. C. R. 307, it was said that the legislature probably meant to enact that, if any person sets fire to anything in a house likely to set fire to the house itself, he should be guilty of felony, but that they had failed to say so. In that case A set fire to goods in a house to spite the owner, but with no intention to burn the house, and (as the jury were considered by the Court to have found) not thinking it probable that what he was doing would have that effect, and not being reckless on the subject. My impression is that the legislature said what it meant, but that the judge who reserved the case (Blackburn, J.) was not followed by the jury in the directions which he gave.

[6] 24 & 25 Vict. c. 97, s. 16, S. W.

[7] Ibid. ss. 8, S. W., 27, 44, S. W.

building or to anything mentioned in clause (*b*) of this Article, or to any mine mentioned in Article 377, clause (*a*); or to set fire, to cast away, or destroy any ship or vessel under such circumstances that if such building, mine, or ship were thereby set fire to, cast away, or destroyed, the offender would felony; or

(*e.*) [1] who places or throws in, into, upon, [2] under, against or near any building, ship, or vessel any gunpowder or other explosive substance with intent to destroy or damage any such building, ship, or vessel, or any engine, machinery, working tools, fixtures, goods, or chattels, whether or not explosion takes place, and whether or not any damage is caused; or

(*f.*) [3] who destroys any part of any ship or vessel in distress, wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel; or

(*g.*) [4] who kills, maims, or wounds any cattle; or

(*h.*) [5] who cuts or otherwise destroys any hopbinds growing on poles in any plantation of hops.

Article 379.

THREATS TO BURN, ETC.—TEN YEARS PENAL SERVITUDE.

[6] Every one commits felony, and is liable upon conviction thereof to a maximum punishment of ten years penal servitude, who, knowing the contents thereof, sends, delivers, utters, or directly or indirectly causes to be received any letter or writing threatening to burn or destroy any house,

[1] 24 & 25 Vict. c. 97, ss. 10, S. W., 45, S. W.

[2] The word "under" does not occur in s. 45 which applies to ships and vessels and which repeats s. 10 verbatim, with the exception of the omission of that word and the substitution of "injury is effected" for "damage is caused." The omission of "under" as to vessels dates from before the invention of torpedoes.

[3] 24 & 25 Vict. c. 97, s. 49, S.

[4] Ibid. s. 40, S. An injury inflicted by the hand may be a wound: *R.* v. *Bullock*, L. R. 1 C. C. R. 115. On repealed statutes to the same effect, see *R.* v. *Owens*, 1 Moo. 205, and *R.* v. *Hughes*, 2 C. & P. 420, in which Parke, B., said setting a dog at an animal whereby it was bitten was not a maiming or wounding.

[5] 24 & 25 Vict. c. 97, s. 19, S. W.

[6] Ibid. s. 50, S. W.

barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, whether in or under any building or not, or any ship or vessel, or to kill, maim, or wound any cattle.

Article 380.

MALICIOUS MISCHIEF—SEVEN YEARS PENAL SERVITUDE.

Every one commits felony and is liable upon conviction to seven years penal servitude as a maximum punishment who does any of the following acts unlawfully and maliciously (that is to say),

(*a.*) [1] who cuts, breaks, destroys, or damages with intent to destroy or render useless any machine or engine, whether fixed or moveable, used or intended to be used for [2]any agricultural operation, or prepared for or employed in any manufacture other than those enumerated in note 4 to Article 377 (*c*), or any tool or implement, whether fixed or moveable, prepared for or employed in any such manufacture;

(*b.*) [3]or who by any overt act attempts to set fire to any of the stacks or produce mentioned in Article 377, clause (*a*), or to anything mentioned in Article 378, clause (*c*), under such circumstances that if the same were set on fire the offender would be guilty of felony;

(*c.*) [4]or who, with intent thereby to destroy or damage any mine or to hinder [5][obstruct] or delay the working thereof,

causes any water to be conveyed or run into any mine, or into any subterranean passage communicating therewith;

or [6]pulls down, fills up, obstructs, or damages with intent

[1] 24 & 25 Vict. c. 97, s. 15, S. W. Some cases on the application of this section to imperfect machines are collected in Fisher's Digest, pp. 2591–2593.

[2] "Sowing, reaping, mowing, threshing, ploughing, or draining, or for performing any other agricultural operation."

[3] 24 & 25 Vict. c. 97, s. 18, S. W.

[4] Ibid. s. 28, S. W.

[5] This word refers only to the paragraph marked with a *.

[6] This accumulation of intents is clumsy, but not unmeaning. The expression, "Damage with intent to destroy an airway with intent to obstruct a mine," has a meaning slightly narrower than "damaging an airway with intent to obstruct a mine," but not very different from it.

to destroy, obstruct, or render useless any airway, waterway, drain, pit, level, or shaft of or belonging to any mine; or

* [1] pulls down or destroys, or damages with intent to destroy or render useless any steam or other engine for sinking, draining, ventilating, or working any mine, or in anywise assisting [2] therein, or any appliance or apparatus in connection with any such engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether any such [3] thing is completed or unfinished; or

[4] stops, obstructs, or hinders the working of any such engine, apparatus, or appliance; or

(*d.*) [5] who wholly or partially cuts through, severs, breaks, unfastens, or damages with intent to destroy or render useless, any rope, chain, or tackle of whatever material used in any mine, or upon [6] any way or work connected therewith or employed in working it; or

(*e.*) [7] who cuts off, draws up, or removes any piles, chalk, or other materials fixed in the ground and used for securing any sea bank or sea wall, or the bank, dam, or wall of any other [8] water; or

(*f.*) [9] who, with intent and so as thereby to obstruct and prevent the carrying on or completing or maintaining the navigation of any navigable river or canal, opens or draws

[1] 24 & 25 Vict. c. 97, s. 29, S. W.

[2] The words "sinking—mine" are here repeated.

[3] The words "bridge—trunk" are here repeated.

[4] The words relating to the intent with which these acts are not to be done follow these words. I think, however, that they are meant to apply to all the words which precede them. If not, the words as to intent at the beginning of the clause do not apply to the paragraph beginning "or pulls down." The sections are very clumsy.

[5] 24 & 25 Vict. c. 97, s. 29, S. W.

[6] "Any inclined plane, railway, or other way or other work whatsoever in anywise belonging or appertaining to or connected with or employed in any mine, or the working or business thereof."

[7] 24 & 25 Vict. c. 97, s. 31, S. W.

[8] "river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock."

[9] 24 & 25 Vict. c. 97, s. 31, S. W.

up any flood-gate or sluice, or does any injury or mischief to such river or canal; or

(*g.*) [1] who cuts through, breaks down, or otherwise destroys the dam, flood-gate, or sluice of any fish-pond, or of any water being private property, or in which there is any private right of fishery, with intent thereby to take or destroy any of the fish therein, or so as thereby to cause the loss or destruction of any of them; or

(*h.*) [1] who puts lime or any other noxious material in any such water [2] or in any salmon river with intent to destroy any fish then being or afterwards to be put therein; or

(*i.*) [1] who cuts through, breaks down, or otherwise destroys the dam or flood-gate of any mill pond, reservoir, or pool; or

(*j.*) [3] who damages with intent to destroy or render it useless, any ship or vessel, whether complete or incomplete, by any means other than fire, gunpowder, or other explosive substance; or

(*k.*) [4] who cuts away, casts adrift, removes, alters, defaces, or destroys any boat, buoy, buoy rope, perch, or mark used or intended for the guidance of seamen for the purposes of navigation, or who does any act with intent to do any of the things aforesaid, or who in any other manner injures or conceals any of the things aforesaid.

Article 381.

DAMAGE TO TREES—FIVE YEARS PENAL SERVITUDE.

[5] Every one commits felony and is liable upon conviction thereof to five years penal servitude as a maximum punishment who unlawfully and maliciously

cuts, breaks, barks, roots up, or otherwise destroys or damages the whole or any part of any tree, sapling, shrub,

[1] 24 & 25 Vict. c. 97, s. 32, S. W.

[2] These words are added by 36 & 37 Vict. c. 71, s. 13. For definition of "salmon river," see 28 & 29 Vict. c. 121, s. 3, and 24 & 25 Vict. c. 109, s. 4.

[3] Ibid. s. 46, S. W.

[4] Ibid. s. 48, S. W.

[5] 24 & 25 Vict. c. 97, ss. 21, 20, S. W. These sections are thus arranged in the Act (20.): Whoever cuts . . . trees . . . in any park, &c., if the damage exceeds £1, is guilty of felony, &c. (21.) Whoever cuts . . . trees . . . not growing in any park, &c., if the damage done exceeds £5, is guilty of felony, &c. The text is only half as long, and has precisely the same meaning.

or any underwood, if the injury done exceeds the sum of £5, [1] or the sum of £1 if the thing injured grows in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house.

Article 382.

MAKING AND POSSESSING GUNPOWDER FOR CERTAIN PURPOSES.

[2] Every one commits a misdemeanor, and is liable upon conviction thereof to a maximum punishment of two years imprisonment and hard labour, who knowingly has in his possession, or makes or manufactures any gunpowder, explosive substance, dangerous or noxious thing, machine, engine, instrument, or thing for such intent, by means thereof, to commit, or for the purpose of enabling any other person to commit any felony mentioned in the 24 & 25 Vict. c. 100, or the 24 & 25 Vict. c. 97.

Article 383.

SUNDRY INJURIES TO PROPERTY.

Every one commits a misdemeanor, and is liable upon conviction thereof to the punishments and other consequences stated in the schedule printed in the note hereto, who unlawfully and maliciously does any of the following things (that is to say):

(*a*.) [3] who being possessed of [4] any building or part of

SCHEDULE.

24 & 25 Vict. c. 97. No. of Clause.	Punishment.	How inflicted.
(*a*) Sect. 13.	As for a misdemeanor at common law.	On indictment.

[1] These sums are exclusive of consequential damage. A did injury to the amount of £1 to a hedge which it would cost £4 14*s*. 6*d*. to replace. This is injury to the amount of £1, not to the amount of £5 14*s*. 6*d*.: *R*. v. *Whiteman*, Dear. 353 (upon 7 & 8 Geo. 4, c. 30, s. 19).

[2] 24 & 25 Vict. c. 100, s. 64, S. W.; 24 & 25 Vict. c. 97, s. 54, S. W. The felonies in question are those specified in this Chapter, and in Chapters XXIV.–XXX., both inclusive, and in Articles 74 and 168.

[3] 24 & 25 Vict. c. 97, s. 13.

[4] "any dwelling-house or other building, or part of any dwelling-house or other building."

any building as tenant for a term, at will, or on sufferance, or held over after the termination of any tenancy, pulls down or demolishes, or begins to pull down or demolish the same or any part thereof, or pulls down or severs from the freehold any fixture being fixed in or to, or being part of such building; or

(*b.*) [1] who cuts, breaks, barks, roots up, or otherwise destroys or damages the whole or part of any tree, sapling, or shrub, or any underwood wheresoever growing, to the amount of one shilling at the least; or

(*c.*) [2] who destroys or damages with intent to destroy any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory; or

SCHEDULE.

24 & 25 Vict. c. 97. No. of Clause.	Punishment.	How inflicted.
(*b*) Sect. 22.	*For first offence*, three months imprisonment with hard labour as a maximum punishment, or a maximum fine of £5 over and above the damage done.	On conviction before a justice of the peace.
	For second offence, imprisonment with hard labour for a maximum period of twelve months.	Do.
	For third and other offences, maximum punishment of two years imprisonment and hard labour, S. W.	On indictment.
(*c*) Sect. 23.	*First offence.* Six months imprisonment and hard labour as a maximum punishment, or a fine of £20 as a maximum over and above the amount of the damage done.	On conviction before a justice of the peace.
	Subsequent offences. Felony, maximum punishment five years penal servitude, S. W.	On indictment.

[1] 24 & 25 Vict. c. 97, s. 22.

[2] Ibid. s. 23.

(*d.*) [1] who destroys or damages with intent to destroy any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture and growing on any land not being a garden, orchard, or nursery ground; or

(*e.*) [2] who cuts, breaks, throws down, or in any wise destroys any fence of any description whatever, or any wall, stile, gate, or any part thereof; or

(*f.*) [3] who throws down, levels, or otherwise destroys in whole or in part any turnpike gate or toll-bar, or [4] fence belonging to any turnpike or toll-bar, or set up or erected to prevent passengers from passing by without payment of any toll directed to be paid by any Act of Parliament, or any

SCHEDULE.

24 & 25 Vict. c. 97. No. of Clause.	Punishment.	How inflicted.
(*d*) Sect. 24.	*First offence.* Imprisonment and hard labour for one month as a maximum punishment, or a maximum fine of 20*s.* over and above the amount of the injury, and imprisonment with or without hard labour for a maximum time of a month, unless payment is sooner made, in default of payment of fine and costs if ordered.	Conviction before a justice of the peace.
	Subsequent offences. Imprisonment with hard labour for a maximum term of six months.	Do.
(*e*) Sect. 25.	*First offence.* Maximum fine of £5.	Conviction before a justice of the peace.
	Subsequent offences. Imprisonment with hard labour for a maximum term of twelve months.	Do.
(*f*) Sect. 34.	As for a misdemeanor.	On indictment.

[1] 24 & 25 Vict. c. 97, s. 24.

[2] Ibid. s. 25.

[3] Ibid. s. 34.

[4] "any wall, chain, rail, post, bar, or other fence."

house, building, or weighing engine erected for the better correction, ascertainment, or security of any such toll; or

(*g*.) [1] who cuts, breaks, throws down, destroys, injures, or removes anything whatever [2] being part of or used in or about any electric or magnetic telegraph, or in the working thereof, or prevents or obstructs in any manner whatever the sending, conveyance, or delivery of any communication by any such telegraph; or

(*h*.) [3] who by any overt act attempts [4] to commit any offence specified in clause (*g*); or

(*i*.) [5] who destroys or damages any book, manuscript, [6] work of art, or thing kept for the purposes of art, science, of literature, or as an object of curiosity in any [7] repository

SCHEDULE.

24 & 25 Vict. c. 97. No. of Clause.	Punishment.	How inflicted.
(*g*) Sect. 37.	Maximum punishment, two years imprisonment with hard labour. Provided that if the justice before whom any person is examined thinks it expedient for the ends of justice, he may inflict maximum punishment of imprisonment with hard labour for three months, or a maximum fine of £10.	On indictment. On summary conviction.
(*h*) Sect. 33.	Maximum punishment of three months imprisonment with hard labour, or maximum fine of £10.	On conviction before a justice of the peace.
(*i*) Sect. 39.	Misdemeanor. Maximum punishment six months imprisonment and hard labour, W.	On indictment.

[1] 24 & 25 Vict. c. 97, s. 37.

[2] "any battery, machinery, wire, cable, post, or other matter or thing whatsoever."

[3] 24 & 25 Vict. c. 97, s. 38.

[4] How can a man possibly attempt without an "overt act." See section on Attempts.

[5] 24 & 25 Vict. c. 97, s. 39, W.

[6] Work of art = picture, print, statue, bust, vase, or any other article or thing kept for the purposes of art.

[7] "museum, gallery, cabinet, library, or other repository."

open at all times or from time to time for the admission of the public, or to any considerable number of persons, whether by the permission of the proprietor, or by the payment of money; or

any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art in any [1] place of divine worship or public building, or [2] public place, churchyard, or burial ground; or

any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument; or

(*j*.) [3] who kills, maims, or wounds any dog, bird, or other animal not being cattle, but being either the subject of larceny at Common Law, or being ordinarily kept in a state of confinement, or for some domestic purpose; or

(*k*.) [4] who by any unlawful act or by any wilful omission or neglect, obstructs or causes to be obstructed any engine or carriage using any railway or aids therein; or

SCHEDULE.

24 & 25 Vict. c. 97. No. of Clause.	Punishment.	How inflicted.
(*j*) Sect. 41.	*First offence.* Maximum punishment six months imprisonment with hard labour, or maximum fine of £20.	Conviction before a justice of the peace.
	Subsequent offences. Imprisonment with hard labour for a maximum term of twelve months.	Do.
(*k*) Sect. 36.	Maximum punishment two years imprisonment and hard labour.	On indictment.

[1] See definition of these words in Art. 1 (*a*) from "belonging to the Queen" to "Inn of Court."

[2] public place = street, square, public garden, or ground.

[3] 24 & 25 Vict. c. 97, s. 41.

[4] Ibid. s. 36. Changing a signal so as to cause a train to go slower than it otherwise would is an obstructing: *R.* v. *Hadfield*, L. R. 1 C. C. R. 253; so is stretching out the arms as a signal: *R.* v. *Hardy*, L. R. 1 C. C. R. 278. A railway not opened for public traffic may be obstructed: *R.* v. *Bradford*, Bell, C. C. 269.

(*l.*) [1] who unlawfully and maliciously commits any damage, injury, or spoil to an amount exceeding £5, to, or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is otherwise provided in this chapter; or

(*m.*) [2] who wilfully or maliciously commits any damage, injury, or spoil upon any real or personal property whatsoever ([3] including injuries to trees, saplings, shrubs, or underwood), either of a public or private nature, for which no punishment is hereinbefore provided.

Provided that this clause does not extend to any case where the party acts under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass not being wilful and malicious committed in hunting, fishing, or in the pursuit of game.

SCHEDULE.

24 & 25 Vict. c. 97. No. of Clause.	Punishment.	How inflicted.
(*l*) Sect. 51.	Maximum punishment two years imprisonment and hard labour, and if offence committed between 9 P.M. and 5 A.M. maximum punishment five years penal servitude.	On indictment.
(*m*) Sect. 52.	Maximum punishment two months imprisonment and hard labour, or £5, and whatever sum not exceeding £5 the justice thinks fit as compensation for the damage. If payment of sums ordered, and costs if ordered, is not made within a time specified, the justice may commit the offender to prison for a maximum period of two months with hard labour, unless the sum ordered is sooner paid.	Conviction before a justice of the peace.

[1] 24 & 25 Vict. c. 97, s. 51.
[2] Ibid. s. 52.
[3] Ibid. s. 53.

CHAPTER XLVIII.

OFFENCES RELATING TO GAME, WILD ANIMALS, AND FISH.

ARTICLE 384.

"NIGHT" AND "GAME" DEFINED.

In this chapter the following words are used in the following senses:—

[1]"Night" means the interval between the end of the first hour after sunset, and the beginning of the last hour before sunrise.

[2]"Game" means hares, pheasants, partridges, grouse, heath or moor game, black game and bustards.

ARTICLE 385.

NIGHT POACHING AND ASSAULTING KEEPER

Every one commits a misdemeanor and is liable upon conviction thereof to the maximum punishment mentioned in the schedule in the foot-note to this article, who does any of the following things (that is to say):

(*a*.) [3]who by night unlawfully takes or destroys any

SCHEDULE:

Offence under Clause	Maximum punishment.	How inflicted.
(*a*)	*First offence.* Three months' hard labour. At the expiration two sureties in £5 or one in £10 not so to offend for one year. In default six months' further hard labour, unless sureties found.	Conviction before two justices.
	Second offence. Six months' hard labour. At the expiration thereof	Do.

[over.

[1] 9 Geo. 4, c. 69, s. 12; 24 & 25 Vict. c. 96, ss. 17, 24.

[2] 9 Geo. 4, c. 69, s. 13.

[3] Ibid. s. 1.

game or rabbits in any land, whether open or inclosed, or by night unlawfully enters or is in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game; or

(*b.*) [1] who assaults or offers any violence with any gun, cross-bow, firearms, bludgeon, stick, club, or any other offensive weapon whatever, towards any person authorized to seize and apprehend [2] him for the offence specified in clause (*a*).

Article 386.

OFFENCES RELATING TO DEER, HARES, RABBITS, AND FISH.

Every one commits an offence, and is liable upon conviction thereof to the punishment and other consequences stated in the [3] schedule in the note hereto, who does any of the following things (that is to say):

SCHEDULE.

Offence under Clause	Maximum punishment.	How inflicted.
	to enter into his own recognizance for £20, and two sureties at £10 each, or one at £20, not so to offend for two years. In default of sureties, further imprisonment with hard labour for one year, unless such sureties are found.	
	Third offence. Seven years penal servitude.	Indictment.
(*b*)	Seven years penal servitude.	Do.

[1] 9 Geo. 4, c. 69, s. 2.

[2] *i.e.* the owner or occupier of the land, the lord of the manor or reputed manor in which the land is situated, any person having a right or reputed right of free chase, or free warren thereon, any gamekeeper or servant of any such person, any person assisting such gamekeeper or servant, finding the offender on the land where the offence is committed, or in any place to which pursuit is made: Sect. 2.

[3] See Schedule, p. 315.

(*a.*) [1]who unlawfully and wilfully courses, hunts, snares, or carries away, kills, wounds, or attempts to kill or wound any deer kept or being

(i.) in the uninclosed part of any forest, chase, or purlieu;

(ii.) [2]in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer are usually kept; or

(*b.*) [3] who does not satisfy any justice of the peace before whom he is taken or summoned that he had a lawful occasion for any snare or engine for the taking of deer found in his possession or on his premises with his knowledge, and did not keep the same for any unlawful purpose, and that he came lawfully by any deer, or the head, skin, or other part thereof so found, or which (upon summoning the persons through whose hands the same appear to have passed) are shewn to have been first received by him, or to have been in his possession; or

(*c.*) [4] who unlawfully and wilfully sets or uses any snare or engine whatsoever for the purpose of taking or killing any

SCHEDULE.

No. of Clause.	Maximum punishment and other consequences.	How inflicted.
(*a*) (i.) Sect. 12.	*First offence.* Fine of £50.	Conviction before a justice.
	Offence after previous conviction of any offence relating to deer for which a pecuniary penalty is imposed by any Act of Parliament, felony, two years' imprisonment and hard labour.	Indictment.
(*a*) (ii.) Sect. 13.	Felony. Two years' imprisonment and hard labour.	Indictment.
(*b*) Sect. 14.	Fine of £20.	Conviction before a justice.
(*c*) and (*d*) Sect. 15.	Fine of £20.	Do.

[1] 24 & 25 Vict. c. 96, s. 12, S. W.
[2] Ibid. s. 13, S. W.
[3] Ibid. s. 14.
[4] Ibid. s. 15.

deer in any part of any forest, chase, or purlieu, whether such part is inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer are usually kept; or

(*d.*) [1] who unlawfully and wilfully destroys any part of the fence of any land where any deer are then kept; or

(*e.*) [2] who having entered into any forest, chase, or purlieu, inclosed or not, or into any inclosed land where deer are usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, unlawfully beats or wounds any person intrusted with the care of the deer, or any of his assistants, in the execution of the powers hereunder mentioned;[3] or

(*f.*) [4] who unlawfully and wilfully takes or kills any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not,

(i.) by night,

(ii.) by day (elsewhere than on any sea bank or river bank

SCHEDULE.

No. of Clause.	Maximum punishment and other consequences.	How inflicted.
(*e*) Sect. 16.	Felony. Two years imprisonment and hard labour.	Indictment.
(*f*) (i.) Sect. 17.	Misdemeanor.	Do.
(*f*) (ii.) Sect. 17.	£5 fine.	Conviction before a justice.

[1] 24 & 25 Vict. c. 96, s. 15. [2] Ibid. s. 16, S. W.

[3] Every person intrusted with the care of the deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer.

[4] 24 & 25 Vict. c. 96, s. 17.

in the county of Lincoln, so far as the tide extends, or within one furlong of such bank); or

(*g*.) [1] who sets or uses any snare or engine for the taking of hares or rabbits in any such place at any time; or

(*h*.) [2] who [3] unlawfully and wilfully takes or destroys, or attempts to take or destroy any fish, otherwise than by angling in the day-time,

(i.) in any water running through or being in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein,

(ii.) in any other water being private property, or in which there is any private right of fishery; or

(*k*.) [4] who unlawfully or wilfully takes or destroys, or attempts to take or destroy, fish by angling in the daytime,

(i.) in any water mentioned in (*h*) (i.)

(ii.) in any water mentioned in (*h*) (ii.).

SCHEDULE.

No. of Clause.	Maximum punishment and other consequences.	How inflicted.
(*g*) Sect. 17.	£5 fine.	Conviction before a justice.
(*h*) (i.) Sect. 24.	Misdemeanor.	Indictment.
(*h*) (ii.) Sect. 24.	£5 fine above value of fish.	Conviction before a justice.
(*k*) (i.) Sect. 24.	£5 fine.	Do.
(*k*) (ii.) Sect. 24.	£2 fine.	Do.

[1] 24 & 25 Vict. c. 96, s. 17. It is not perfectly clear whether the words "unlawfully" and "wilfully" apply to this offence; but in any case they would, I think, be implied.

[2] 24 & 25 Vict. c. 96, s. 24.

[3] These words apply only to (ii.).

[4] 24 & 25 Vict. c. 96, ss. 24, 25.

[1] If any person is found committing any offence under (*h*) (i.), (*h*) (ii.), (*k*) (i.) or (*k*) (ii.), the owner of the ground, water, or fishery where such offender is found, his servant, or any person authorized by him, may demand from such offender any rod, line, hook, net, or other implement, for taking or destroying fish then in such offender's possession, and if such offender does not immediately deliver up the same, may seize and take it from him for the use of such owner. Any person angling by day is by such taking or delivery, exempted from any further damage or penalty.

[1] 24 & 25 Vict. c. 96, s. 24.

CHAPTER XLIX.

OFFENCES CONNECTED WITH TRADE AND BREACH OF CONTRACT.

ARTICLE 387.

ABSCONDING WITH PROPERTY IN CONTEMPLATION OF BANKRUPTCY.

[1] EVERY one commits felony, and is liable upon conviction thereof to a maximum punishment of two years imprisonment and hard labour, who quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of £20 or upwards, which ought by law to be divided amongst his creditors, having been adjudged a bankrupt, or having had his affairs liquidated by arrangement after the presentation of a bankruptcy petition against him, or the commencement of his liquidation, or within four months before such presentation or commencement, unless the jury is satisfied that he had no intent to defraud.

[2] ARTICLE 388.

PUNISHMENT OF FRAUDULENT DEBTORS.

[3] Every person adjudged bankrupt, and every person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, commits a misdemeanor, and is liable upon conviction thereof to a maximum punishment of two years imprisonment and hard labour.

(*a.*) If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what considera-

[1] 32 & 33 Vict. c. 62, s. 12.
[2] Ibid. s. 11.
[3] 32 & 33 Vict. c. 71.

tion, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud:

(*b.*) If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud:

(*c.*) If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control, relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud:

(*d.*) If after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of £10 or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud:

(*e.*) If after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of £10 or upwards:

(*f.*) If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud:

(*g.*) If, knowing or believing that a false debt has been proved by any person under the bankruptcy or liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof:

(*h.*) If after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless

the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

(*i.*) If after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intention to conceal the state of his affairs or to defeat the law:

(*j.*) If after the presentation of a bankruptcy petition against him or commencement of the liquidation, or within four months next before such presentation or commencement, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

(*k.*) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs:

(*l.*) [1] If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or at any meeting of his creditors within four months next before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses:

(*m.*) [1] If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit, and has not paid for the same:

(*n.*) [1] If within four months next before the presentation of a bankruptcy petition against him or the commencement of

[1] See *Ex parte Brett*, 1 Ch. D. 151.

the liquidation, he, being a trader, obtains, under the false pretence of carring on business and dealing in the ordinary way in his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud:

(*o.*) If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud:

(*p.*) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs, or his bankruptcy or liquidation.

Article 389.

FALSE CLAIM ON BANKRUPT'S ESTATE.

[1] Every one commits a misdemeanour and is liable upon conviction thereof to a maximum punishment of one year's imprisonment and hard labour,

Who being a creditor in any bankruptcy or liquidation by arrangement or composition with creditors in pursuance of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), wilfully and with intent to defraud makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular.

Article 390.

CONSPIRACIES IN RESTRAINT OF TRADE.

[2] A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

[1] 32 & 33 Vict. c. 62, s. 14

[2] Note XVIII.

Article 391.

WHAT ACTS DONE IN RESTRAINT OF TRADE ARE NOT UNLAWFUL.

[1]The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of Article 390.

[2]No act in contemplation or furtherance of a trade dispute between employers and workmen is unlawful within the meaning of Article 390, unless a person doing it would be punishable for it on indictment, or liable to be imprisoned (either absolutely or at the discretion of the Court as an alternative for some other punishment) on summary conviction.

Article 392.

CONSPIRACIES IN RESTRAINT OF TRADE, MISDEMEANORS.

[2]Every conspiracy in restraint of trade is a misdemeanor, but no person convicted of a conspiracy to do, or procure to be done, in restraint of trade an act punishable only on summary conviction can be sentenced to imprisonment for more than three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.

Article 393.

CRIMINAL BREACHES OF CONTRACT OF SERVICE—INTIMIDATION AND PICKETING.

[3]Every person commits a misdemeanor and is liable upon conviction thereof to be fined £20 or to a maximum imprisonment of three months with hard labour,

(*a*.) [4]who wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to

[1] 34 & 35 Vict. c. 31, s. 2.

[2] 38 & 39 Vict. c. 86. The words of the earlier part of the section are "punishable as a crime." "Crime" is defined at the end of the section as in the text.

[3] 38 & 39 Vict. c. 86, s. 3, last paragraph.

[4] Ibid. s. 5.

believe that the probable consequence of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or

(*b.*) [1] who being employed by a municipal authority, or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority or company or contractor, knowing, or having reasonable cause to believe, that the probable consequence of his so doing, alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part, wholly or to a great extent of their supply of gas or water; or

(*c.*) [2] who being a master legally bound to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured; or

(*d.*) [3] who with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing wrongfully and without legal authority,

(i.) Uses violence to or intimidates such other person or his wife or children, or injures his property; or

(ii.) Persistently follows such other person about from place to place; or

(iii.) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or

(iv.) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or

[1] 38 & 39 Vict. c. 86, s. 4.

[2] Ibid. s. 6.

[3] Ibid. s. 7.

(v.) Follows such other person with two or more other persons in a disorderly manner in or through any street or road.

Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place in order merely to obtain or communicate information is not a watching or besetting within (iv.).

Cases under this Article may be determined by a Court of summary jurisdiction, or if the accused objects to being tried for such offence by such a Court, the Court of summary jurisdiction [must[1]] deal with the case in all respects as if the offender were charged with an indictable offence, and the offence may be prosecuted on indictment accordingly.

Article 394.

BREACHES OF EMPLOYER'S DUTY TO SEAMEN—LEAVING SEAMEN BEHIND.

[2]Every one commits a misdemeanor who

(*a.*) [3]being the master or other person belonging to any British ship wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind, in any place on shore or at sea, in or out of Her Majesty's dominions, any seaman or apprentice belonging to such ship before the completion of the voyage for which such person was engaged, or the return of the ship to the United Kingdom; or

(*b.*) [4]who being the master of a British ship—

(i.) Discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped) without previously obtaining the sanction in writing endorsed on the agreement of some public shipping master, or other officer duly sanctioned by

[1] "may," but apparently it means "must."
[2] 17 & 18 Vict. c. 104.
[3] Ibid. s. 206.
[4] Ibid. s. 207.

the local government in that behalf, or (in the absence of any such functionary) of the chief officer of customs resident at or near the place where the discharge takes place:

(ii.) Discharges any seaman or apprentice at any place out of Her Majesty's dominions without previously obtaining the sanction so endorsed as aforesaid of the British consular officer there, or (in his absence) of two respectable merchants resident there:

(iii.) Leaves behind any seaman or apprentice at any place situate in any British possession abroad, on any ground whatever, without previously obtaining a certificate in writing so endorsed as aforesaid from such officer or person as aforesaid, stating the fact and the cause thereof, whether such cause be unfitness or inability to proceed to sea, or desertion or disappearance:

(iv.) Leaves behind any seaman or apprentice at any place out of Her Majesty's dominions, on shore or at sea, on any ground whatever, without previously obtaining the certificate endorsed in manner and to the effect last aforesaid, of the British consular officer there, or in his absence, of two respectable merchants, if there is any such at or near the place where the ship then is.

The said functionaries must, and the said merchants may, examine into the grounds of such proposed discharge, or into the allegation of such unfitness, inability, desertion, or disappearance as aforesaid in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction or certificate as appears to them to be just.

[1] Upon the trial of any person for any of the offences in this Article mentioned, it lies upon such person to produce the sanction or certificate above mentioned, or to prove that he had obtained the same previously by having discharged or left behind such seaman or apprentice, or that it was impracticable for him to obtain such sanction or certificate.

[1] 38 & 39 Vict. c. 86, s. 208.

Article 395.

BREACHES OF SHIPOWNER'S DUTY TO SEAMEN—SENDING UNSEAWORTHY SHIPS TO SEA.

[1] Every person commits a misdemeanor

(*a.*) who sends a ship to sea in such unseaworthy state that the life of any person would be likely to be thereby endangered, unless he proves that he used all reasonable means to ensure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was under the circumstances reasonable and justifiable;

(*b.*) who is the managing owner of any British ship so sent to sea from any port in the United Kingdom, unless he gives such proof as aforesaid;

(*c.*) who attempts, or is party to any attempt, to send to sea any ship in such unseaworthy state that the life of any person would be likely to be thereby endangered unless he give such proof as aforesaid;

(*d.*) who being a master of a British ship knowingly takes the same to sea in such unseaworthy state that the life of any person would be likely to be thereby endangered, unless he proves that her going to sea in such unseaworthy state was under the circumstances reasonable and justifiable.

Any person accused of any of the offences aforesaid may, for the purpose of giving such proof as is required of him, give evidence in the same manner as any other witness.

Article 396.

BREACH OF DUTY BY SEAMEN TO EMPLOYERS.

[2] Every seaman who has been lawfully engaged, and every apprentice to the sea service, commits an offence and is liable upon summary conviction therefor to the consequences stated in the [3] schedule hereto, who

[1] 38 & 39 Vict. c. 88, s. 4.
[2] 17 & 18 Vict. c. 104, s. 243.
[3] See Schedule, p. 328.

(*a.*) Deserts his ship [*i.e.* leaves the ship without intention to return and without just cause];

(*b.*) [1] Neglects or refuses without reasonable cause to join his ship, or is absent without leave at any time within twenty-four hours of the ship's sailing from any port, either at the commencement or during the progress of any voyage, or is absent at any time without leave and without sufficient reason from his ship or from his duty, in a manner not amounting to desertion, or not treated as such by the master;

(*c.*) Quits the ship without leave after her arrival at her port of delivery and before she is placed in security;

(*d.*) Wilfully disobeys any lawful command;

(*e.*) Continues wilfully to disobey lawful commands, or continues wilfully to neglect duty;

SCHEDULE.

Clause.	Imprisonment with or without Hard Labour.	Other Forfeitures.
(*a.*)	Twelve weeks.	Forfeiture of all or any part of clothes and effects left on board, and of wages then earned, also if such desertion takes place abroad (at the discretion of the Court) to forfeit all or any part of the wages or emoluments he may earn in any other ship in which he may be employed till his next return to the United Kingdom, and to satisfy any excess of wages paid to any substitute engaged in his place at a higher rate.
(*b.*)	Ten weeks.	Two days' pay, and for every twenty-four hours' absence either a sum not exceeding six days' pay or expense of hiring a substitute.
(*c.*)	None.	Sum not exceeding a month's pay.
(*d.*)	Four weeks.	Two days' pay.
(*e.*)	Twelve weeks.	Not exceeding six days' pay for every twenty-four hours' disobedience or expenses of substitute.

[1] *Two Sisters*, 2 W. Rob. 125; 24 L. J. (Q. B.) 12.

(*f.*) Assaults any master or mate;

(*g.*) Combines with any other or others of the crew to disobey lawful commands, or to neglect duty, or to impede navigation of the ship or the progress of the voyage;

(*h.*) Wilfully damages the ship, or embezzles or wilfully damages any of her stores or cargo;

(*i.*) Commits any act of smuggling whereby loss or damage is occasioned to the master or owner.

Article 397.

BREACH OF DUTY OF SEAMEN TO EACH OTHER OR OTHER PERSONS ON BOARD.

[1] Every master of, or seaman or apprentice belonging to, any British ship commits a misdemeanor who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of such ship, or tending immediately to endanger the life or limb of any person belonging to or on board of such ship, or who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness,

SCHEDULE.

Clause.	Imprisonment with or without Hard Labour.	Other Forfeitures.
(*f.*)	Twelve weeks.	None.
(*g.*)	Twelve weeks.	
(*h.*)	Twelve weeks.	Sum equal to loss sustained out of his wages.
(*i.*)	None.	Sum sufficient to reimburse the master or owner for such loss or damage. The whole or a proportionate part of the wages may be retained in satisfaction of or on account of such liability without prejudice to any further remedy.

[1] 17 & 18 Vict. c. 104, s. 239.

refuses or omits to do any lawful act proper and requisite to be done by him for preserving such ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb.

Article 398.

BREACH OF DUTY TO OTHER SHIP IN CASE OF A COLLISION.

[1] In every case of collision between two vessels, it is the duty of the master or person in charge of each vessel, if and in so far as he can do so without danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel her master, crew, and passengers (if any), such assistance as may be practicable, and as may be necessary in order to save them from any danger caused by the collision; and also to give the master or person in charge of the other vessel the name of his own vessel, and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound.

If he fails to do so, and no reasonable cause for such failure is shown, the collision is, in the absence of proof to the contrary, deemed to have been caused by his wrongful act, neglect, or default. Every master or person in charge of a British vessel who fails, without reasonable cause, to render such assistance, or give such information as aforesaid, is guilty of a misdemeanour.

[1] 36 & 37 Vict. c. 85, s. 16.

APPENDIX OF NOTES.

NOTE I.

(TO ARTICLE 27).

THIS proposition and the Illustrations appended to it represent what I believe to be the law relating to the effect of insanity upon crime. Probably no part of the law has been made the subject of more discussion, and few are in a less satisfactory state. The subject has been repeatedly treated both by text-writers and by single judges in dealing with particular cases,[1] but the deliberate written answers given by the judges to questions put to them by the House of Lords in consequence of MacNaghten's case, have a degree of system and comprehensiveness and a weight of authority which can hardly attach to the statements of any single judge, however eminent. All that has been said on the subject appears to me to express in various forms of speech, and with reference to different circumstances, the one general principle, which is—that the bare existence of madness is not in itself an excuse for crime, unless it so affects the conduct of the party on the occasion in question as to show that one or more of the mental elements of crime—intention, will, and knowledge of the legal or moral character of the act—was wanting. Whether the knowledge required is knowledge of the immorality or of the illegality of an action, or both, is a refinement of more speculative interest than practical importance. No jury would convict a man of murder in such a state of facts as that suggested in Illustration (3). This view of the subject is strongly illustrated by the case of *Banks* v. *Goodfellow* (L. R. 5 Q. B. 549). The proposition is so framed as to put idiocy and madness on the same footing, although

[1] For a collection of their statements, see 1 Russ. Cr. 5th Ed. pp. 113-135.

many great authorities, and in particular Lord Hale (1 P. C. ch. iv.), elaborately distinguish between them. I have done this because it seems desirable that the province of law and medicine in this matter should be kept distinct. It is the province of lawyers to define as well as they can the mental elements of guilt. It is the province of physicians to say what diseases or defects of bodily constitution suspend or destroy those elements. I cannot see how the legal effect of ignorance of the nature of an act can be affected by the question whether it is a temporary ignorance produced by curable madness, or a permanent one produced by congenital idiocy. The difference between idiocy and madness might be important in such a case as is suggested in Illustration (2). I know of no express authority on the point, but I think that such feebleness of mind as is there suggested might be said to prevent the person afflicted by it from knowing the quality of his act.

In *R.* v. *Shaw* (L. R. 2 C. C. R. 145), it was held that imbecility arising from gradual natural decay of the faculties is lunacy within the meaning of 8 & 9 Vict. c. 100, which related to the custody of lunatics.

I have marked as doubtful the proposition that a person deprived, by disease affecting his mind, of the power of controlling his conduct is irresponsible, in deference to the language of Parke, B., in *R.* v. *Barton* (3 Cox, C. C. 275), and Bramwell, B., in *R.* v. *Haynes* (1 F. & F. 666); see also *R.* v. *Stokes* (3 C. & K. 185). I submit, however, that the language there used can hardly have been meant to apply to such a case as is suggested in Illustration (4). If it does, I do not see why a man who strikes and kills another in a convulsion fit should not be convicted of murder. The language employed warrants Illustration (5), if it is taken (as I think it should be) only as a strong way of directing the attention of the jury to the importance of not describing an impulse as uncontrollable merely because it is irrational, and is, in fact, uncontrolled.

I have limited the proposition in the manner exemplified by Illustration (6) in reference to the case of *R.* v. *Dove*. See my Gen. View Cr. Law, p. 391.

NOTE II.

(TO ARTICLE 30.)

Hardly any legal doctrine is less satisfactory than the one embodied in this Article. The rule has been too long settled to be

disputed; but on examining the authorities in their historical order, it appears to me to have originated, like some other doctrines, in the anxiety of judges to devise means by which the excessive severity of the old criminal law might be evaded.

The doctrine as it now stands is uncertain in its extent and irrational as far as it goes. It is, besides, rendered nearly unmeaning by the rule that the presumption is liable to be rebutted by circumstances. The first authority on the subject is Bracton, in whose time the more recent doctrine appears to have been unknown. He says:—"Uxor vero furi desponsata, non tenebitur ex furto viri, quia virum accusare non debet nec detegere furtum suum nec feloniam, cum ipsa sui potestatem non habeat, sed vir. Consentire tamen non debet feloniæ viri sui nec coadjutrix esse, sed nequitiam et feloniam viri impedire debet quantum potest. In certis vero casibus de furto tenebitur, si furtum inveniatur sub clavibus uxoris, quas quidem claves habere debet uxor sub custodiâ et curâ suâ. Claves videlicet dispensæ suæ, archæ suæ, et scrinii sui: et si aliquando furtum sub clavibus istis inveniatur, uxor cum viro culpabilis erit. Sed quid si res furtiva in manu uxoris inveniatur, numquid tenebitur vir? Non ut videtur, nisi ei expresse consenserit, vel cum rem ei warrantizaverit cum ipsum vocaverit ad warrantum, et tunc consensisse præsumitur nisi expresse dissentiat, vel nisi de eo præsumatur quod fidelis sit eo quod societatem talis uxoris devitavit in quantum potuit. Item quid erit si uxor cum viro conjuncta fuerit, vel confessa quod viro suo consilium præstiterit et auxilium, numquid tenebuntur ambo? Imo ut videtur, quia vir potest teneri per se cum sit malus, et uxor poterit esse bona et fidelis et liberari. Item uxor mala per se et vir fidelis. Cum ergo uterque possit esse malus per se et alter eorum bonus, ita poterit uterque eorum, simul et conjunctim, esse malus sicut bonus. Solutio. Non igitur erit in omni casu uxor deliberanda propter consensum, auxilium, et consensum, desicut sunt participes in crimine, ita erunt participes in pœna. Et licet obedire debeat viro, in atrocioribus tamen suis latrociniis ei non erit obediendum. Poterit quidem vir ligare et tenere, et uxor sponte et non coarta occidere, et ita ut videtur tenetur maleficio uterque. Do concubina vero, vel familia domus, non erit sicut de uxore. Ipsi vero accusare tenentur, vel a servitio recedere alioquin videntur consentire."

The effect of this passage is that the wife is not bound to accuse her husband, nor is she to be regarded as accessory after

the fact to a theft committed by him merely because she receives the stolen goods, though she may be so regarded if she so conducts herself as to show actual consent to the theft. The passage does not contain a word about her right to steal with impunity in his presence.

The next authority is Assise (27 Edw. 3), which is in these words:—"Un feme fuit arraine de c̃ q̃ el aver felon̄ emble ii s de pain; q̃ disq̃. l le fist per commandem̄t de celuy qui fuit son baron a cel temps. Et les justices ne voilent prendre pur pite a sa conis, mes pr̃isteront l'enquest; per q̃ fut trove que el' le fit per cohersion de son baron maugre le soe̅ per que el' ala quite, et dit fuit q̃ p command de baron sans auter cohersion, ne serra nul manner de felon̄," &c.

In this case the jury seem to have found actual coercion by the husband. The dictum that the husband's command, he being absent, relieves the wife from guilt is clearly wrong according to more modern authorities. In Fitzherbert's Abridgment (A. D. 1565), Corone, 199, the case in the Book of Assizes is quoted in an abridged form; and Staundforde (A. D. 1583), c. 19, quotes Fitzherbert, but adds a *quære* to the dictum appended to the case, on which Fitzherbert relies. He does not, however, quote the case itself.

Coke (3rd Inst. ch. xlvii. p. 108) says:—"A feme covert committeth not larceny if she does it by the coertion of her husband; but a feme covert may commit larceny if she doth it without the coertion of her husband." He quotes 27 Ass. 40, and Staundforde, but does not say that the bare presence of the husband is to be regarded as coercion, and does not notice the dictum as to the husband's command.

Bacon, upon the maxim "Necessitas inducit privilegium quoad jura privata," observes, "The second necessity is of obedience, and therefore where baron and feme commit a felony, the feme can neither be principal nor accessory, because the law intends her to have no will in regard of the subjection and obedience she owes to her husband." For this he quotes the passage in Staundforde already referred to, and Fitzherbert (Corone, 160), which states, as the effect of a case, in 2 Edw. 3, that eight men and a woman being convicted of felony, and the woman declaring that she was the wife of one of the men, and the jury saying they knew nothing of it, the judge inquired of the bishop. Lord Bacon's proposition thus goes infinitely beyond his authorities.

Dalton (Justice, ch. clvii.) says:—"A feme covert doth steal goods by the compulsion or constraint of her husband. This is no felony in her." And he quotes Fitzherbert and the case quoted by Fitzherbert. He also quotes Bracton in a very unintelligent and fragmentary way, and says that in murder and treason the husband's compulsion does not excuse the wife. As to murder, his authority is Marrow,[1] an author of the time of Henry VII. As to treason, he quotes Fitzherbert (Cor. 130). This passage refers to the case of a woman sentenced to be burnt for coining, respited on the ground of pregnancy, delivered of her child, and becoming pregnant again before she was burnt. The case does not say that she was married at all, and rather implies that she was not.

Hale (1 P. C. 45) says:—"If she (the wife) commit larceny by the coercion of the husband, she is not guilty (27 Ass. 40), and, according to some, if it be by the command of her husband, which seems to be law if the husband be present, but not if her husband be absent at the time and place of the felony committed.

"But this command or coercion of the husband doth not excuse in case of treason nor of murder, or in regard of the heinousness of those crimes." He quotes for this the passage in Dalton given above and the cases of Arden and Somerville as to treason, and Lady Somerset as to murder. He goes on: "If the husband and wife together commit larceny or burglary, by the opinion of Bracton (lib. iii. ch. xxxii. s. 10), both are guilty," (Bracton says nothing of the sort), "and so it hath been practised by some Judges. *Vide* Dalt., *ubi supra*, ch. civ." (Dalton does not say so.) "And possibly, in strictness of law, unless the actual coercion of the husband appears, she may be guilty in such a case; for it may many times fall out that the husband doth commit larceny by the instigation, though he cannot in law do it by the coercion, of his wife; but the latter practice hath obtained, that if the husband and wife commit burglary and larceny together, the wife shall be acquitted, and the husband only convicted; and with this agrees the old book (2 E. 3, Corone, 160). And this being the modern practice, and, *in favorem vitæ*, is fittest to be followed; and the rather because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the wife hanged, where the case is within clergy, though I confess this reason is but of small

[1] Lambard's "Preface" begins, "To write of the office and duties of a justice of the peace, after H. Marrow," is like "bringing owls to Athens." Marrow is said to have been a Master in Chancery in *Willes* v. *Bridger*, 2 B. & Ald. 282.

value; for in manslaughter committed jointly by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture.

"And accordingly in the modern practice where the husband and wife, by the name of his wife, have been indicted for a larceny or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the husband acquitted, merciful judges have used to reprieve the wife before judgment, because they have thought, or at least doubted, that the indictment was void against the wife, she appearing by the indictment to be a wife, and yet charged with felony jointly with her husband.

"But this is not agreeable to law, for the indictment stands good against the wife, inasmuch as every indictment is as well several as joint."

This extract probably gives the key to the confusion of the law upon this subject. It was thought hard that a woman should be hanged for a theft for which her husband had his clergy, and accordingly a loophole was devised for married women, similar, as far as theft was concerned, to clergy for men. Hale's remark as to manslaughter shows how incomplete and unsystematic the arrangement was.

Hawkins (1—4) says:—"If she . . . be guilty of treason, murder, *or robbery*, in company with, or by the coercion of, her husband, she is punishable as much as if she were sole." And Blackstone excepts "treason and *mala in se*, as murder and the like."

The recent cases on the subject are referred to in the Illustrations to the Article and in the foot-note.

Surely, as matters now stand, and have stood for a great length of time, married women ought, as regards the commission of crimes, to be on exactly the same footing as other people. But owing partly to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured by a rule which is tolerable only because it is practically evaded on almost every occasion where it ought to be applied.

NOTE III.

(TO ARTICLE 47.)

In *R.* v. *Welham* (1 Cox, C. C. 193), Mr. Justice Patteson, after consulting Baron Parke, said, "We are both clearly of opinion

that there can be no inciting to commit a felony unless the party incited knows that the act in which he is to engage is a felony." Upon this Mr. Greaves (1 Russ. Cr. 84, note (*o*)) asks, "How can the guilt of the inciter depend upon the state of mind of the incited? The inciting and the intention of the inciter constitute the offence." As I understand the facts of *R.* v. *Welham*, Welham incited Hood to carry off corn which Hood supposed Welham to have a right to carry off. If this were so, Welham's offence, if any, was an attempt to commit a felony by an innocent agent, and not an incitement to commit a felony, which view would justify the language of the two eminent judges. A. tells B. to put into C.'s tea something which B. supposed to be powdered sugar, but which is really arsenic. This is an attempt by A. to murder C., but it is not an inciting B. to commit murder.

This view is strengthened by *Williams' Case* (1 Den. C. C. 39), in which it was held that to instigate a person to poison another under such circumstances that the instigator would have been an accessory before the fact if the poison had been given, was not an attempt to administer poison.

NOTE IV.

(TO ARTICLE 49.)

The history of the law on this subject is in a few words as follows: Originally the maxim *Voluntas reputabitur pro facto* appears to have prevailed, at least in some cases, though it is difficult to say how far it extended. The will, however, had to be shown by some overt act.

After this maxim had become obsolete, a variety of cases were decided which proceeded on the principle that, though a bare intent to commit a crime was not criminal in itself, an intent coupled with an act was criminal. The broadest expression of this view is to be found in Lord Mansfield's language in *Scofield's Case*. More recently still the view embodied in the text as to the criminality of attempts has been adopted, but the other view has not been entirely given up; and I should hesitate to say no act leading up to a crime could be criminal unless it amounted to an attempt. The indictment in *Dugdale* v. *R.* (1 E. & B. 135) is not for an attempt to publish the prints, though the judgment in *R.* v. *Roberts*, decided two years afterwards, suggests that it might have been so described.

NOTE V.

(TO CHAPTER 6.)

OFFENCES AGAINST ALLEGIANCE.

This chapter is intended to express in a consecutive and (as far as is consistent with correctness) in a systematic form the existing law as to treason and treasonable felonies.

The arrangement of the chapter depends upon the following analysis:—High treason is of six kinds, viz., 1. By imagining the king's death. 2. By levying war. 3. By adhering to the king's enemies. 4. By imagining the death of the queen consort, &c. 5. By violating the queen consort, &c. 6. By slaying the chancellor, &c. Of these branches of the offence, Nos. 4, 5, and 6 call for no remark. Each of the other three, and more particularly treason by imagining the king's death and treason by levying war, require some observation. Each of these depends ultimately upon 25 Edw. 3., st. 5, c. 2.

The important words of this statute are, "When a man doth compass or imagine the death of our lord the king" . . . . "and thereof be proveably attainted by open deed."

By judicial constructions, which are given at length in Coke, Hale, and Foster, these words were stretched so as to include Articles 51 and 52, and by the 36 Geo. 3, c. 7, which was rendered perpetual by the 57 Geo. 3, c. 6, these constructions received the sanction of the legislature.

In 1848, however, the first part of the 57 Geo. 3, c. 6, was repealed, so much only of it being retained as extended the words "compass or imagine the king's death" to compassing or imagining the infliction on the king of any kind of bodily injury or restraint. The judicial constructions which made compassing and imagining the deposition of the king, compassing and imagining certain forms of levying war against him, and the instigation of foreigners to invade the realm, overt acts of treason by imagining the king's death became statutory felonies, but the cases by which those constructions were established remained untouched. At present, accordingly, all these acts are both treason and felony—treason by judicial constructions put upon the Act of 25 Edw. 3 (Articles 51–54), and felony by 11 Vict. c. 12 (Article 62).

Treason by actual levying of war has been made the subject of judicial constructions nearly as strained as those which have been

applied to the other branch of the statute. The whole history of the doctrine is examined in an exhaustive manner in Luder's Considerations on the Law of High Treason, in the article of levying war, which appears to me to show distinctly that Article 53 (c) rests on very indifferent authority. If it is law, almost every political riot is high treason. Probably one effect of the enactment of the 11 Vict. c. 12, will be to prevent this interpretation of the section from being put forward again. It has, however, been so strongly laid down by Foster and others, that a statement of the law which omitted it would be incomplete.

I think that Article 53 (*b*) rests on far stronger grounds, both of authority and reason, than Article 53 (*c*). As for authority, it was recognized and acted on in the case of *R.* v. *Frost* in 1840, and in other well-known cases. As for reason, it is obvious that such a rebellion as that which Frost headed was, as far as it went, a civil war.

NOTE VI.

(TO ARTICLES 91, 92, 93.)

SEDITIOUS LIBELS AND CONSPIRACIES.

I submit these propositions with much diffidence, and with a full consciousness of their imperfection. They form, however, as near an approach as I have been able to make to a definite statement on what must be admitted to be a very vague branch of the law. The law is stated in a variety of forms, but to much the same purpose, in Folkard's Starkie on Slander, pp. 612-621, and 1 Russell on Crimes, pp. 336-341.

The law of libel is elaborately discussed by the Criminal Law Commissioners in various parts of their Reports, but this particular branch of it is passed over somewhat shortly (see 6th Report, pp. 17-18). The result, however, is embodied in their digest of offences against the State inferior to treason (6th Report, Articles 46 and 48, published in 1841). Their definition is founded on the preamble of 50 Geo. 3 & 1 Geo. 4, c. 8, which may be taken as a sort of statutory definition of a seditious libel, as the main object of the Act is to enable the Courts to direct the seizure and destruction of all copies of such libels. I have accordingly taken the words of the statute as the basis of the definition. After the publication of the 6th Report of the Commissioners, the great case of *O'Connell* v. *R.* was decided by the House of Lords. I have

slightly enlarged the language of the statute on the authority of part of the opinion delivered by all the judges, and accepted by the House of Lords, as to the sufficiency of some of the counts in the indictment.

NOTE VII.

(TO ARTICLE 135.)

PERJURY.

The law of perjury is now well settled, but both its existing provisions and its history seem to call for some remark. Its history in particular is little understood, though it presents some very singular features.

There are a few references to the offence of perjury in the laws of the Anglo-Saxon kings, but they are very vague and general, though oaths held a prominent place in their scheme of government. These, as appears from the forms given,[1] were oaths asserting not the existence of particular facts, but the goodness of the swearer's cause. "By the Lord, I am guiltless both in deed and counsel of the charge of which N. accuses me." "By the Lord, the oath is clean and unperjured which N. has sworn." The minute examination of testimony as to facts stated in detail was not the method by which questions were in those days investigated. Hence the kind of offence to which we in the present day give the name of perjury differs entirely from the perjury which is mentioned in the Anglo-Saxon laws.

This opinion is confirmed by the generality of the language used against perjury. "Let every injustice be carefully cast out from this country as far as it can be done, and let fraudulent deeds and hateful illegalities be earnestly shunned, that is, false weights and wrongful measures, and lying witnesses, and shameful fightings, and horrid perjuries, and diabolic deeds in 'morth,' works, and in homicides, in thefts and in plundering," &c. Say the laws of Ethelred[2], and several other legislators repeat this formula with variations. The most definite provision which I have noticed as to perjury is in the laws of King Edward the Elder [3] "Also we have ordained concerning those men who were perjurers if that were made evident or an oath failed to them" (i.e., if they failed to produce the legal number of compurgators; or

[1] Thorpe, 76–8. [2] Ibid. 132. [3] Ibid. 64.

when one of the persons produced refused to join in the oath), "that they afterwards should not be oath-worthy but ordeal-worthy."

Perjury would thus appear in very early times to have been not so much a lie told about a specific matter of fact in the witness box, as a false oath taken in a case in which the matter at issue was decided by the oaths of the persons interested and their compurgators. The decision of cases by the detailed examination of witnesses, and the crimes which arise out of that mode of procedure, were unknown till a comparatively modern period in our history, and, on the other hand, the process of deciding cases by ordeal, by compurgation, or by combat, left deeper traces in our history than we usually suppose.

After the Conquest the ordeal and compurgation were gradually superseded by the institution of the jury, who, as is now well known, were at first witnesses rather than judges. The twelve men of the vicinage who swore before the justices that such a person was guilty or not of such an offence, were a considerable step in advance of compurgators or the proceedings of an ordeal, but they differed very widely from modern jurymen.

We find, accordingly, that in early times, and indeed for several centuries, the only perjury of which the common law took notice was the perjury of jurors, and this was punished, not as a substantial offence, but as an incidental result of the process called "attaint," the main object of which was to set aside a false verdict in certain kinds of actions. Three curious passages in Bracton,[1] Fleta,[2] and Britton,[3] are to much the same purpose. The passages are too long to quote, but they contain careful distinctions between verdicts which are merely mistakes and those which are wilfully false, those in which the blame attaches to the jury and those in which it attaches to the judge. Incidentally they throw great light on the respective provinces of the judge and the jury. They assume, however, throughout that the proper function of the jury was that of established and, so to speak, representative witnesses, who, of course, would be guilty of the gravest possible offence if they perjured themselves. The punishment, accordingly, if their verdict was set aside on the ground of perjury, was, as stated by Fleta, very severe. "Imprimis capiantur et in gaolam detrudantur, et omnes terræ et omnia catalla in manum Regis capiantur, et extra

[1] Bracton, lib. iv. ch. iv. p. 288 b–290 b.

[2] Fleta, ver. 22.

[3] Britton, lib. iv. ch. ix. vol. ii. 212. (Nicholl's Ed.)

manum suam capiantur cum perpetua infamia, per quam lege libera deinceps non poterint congaudere, quorum sacramentis veredictis nunquam erit aliquatenus fides adhibenda." Lord Coke, who refers to these passages in a cursory and unintelligent way, observes that this punishment "was so severe as few or no juries were upon just cause convicted." The fact probably is that the process of attaint, which was at all times intricate and clumsy in the extreme, fell into disuse, as other ways of reversing a verdict were adopted, and as the juries became judges of the fact instead of witnesses, a process which took place silently, but which was certainly complete in the fifteenth century, when Fortescue wrote his book De Laudibus Legum Angliæ.

The real singularity is, that for several centuries no trace is to be found of the punishment of witnesses for perjury. The only passage in any early handbook bearing on this offence which I have been able to find, besides those in Bracton and Fleta already referred to, is in the Mirror, a work of very little authority.[1] The passage is as follows: "Perjury is a great offence of which ye are to distinguish either of perjury of false testimony, or by breach of faith, or by breach of the oath of fealty: Of the first perjury ye are to distinguish either of perjury mortal or venial: if of mortal then the judgment was mortal to the example of apparent murderers." Bk. II. s. 19, p. 208. This passage, however, stands alone. In an earlier chapter (Ch. I. s. 5, p. 18) the author treats perjury as consisting exclusively of breaches of promissory oaths by the officers of the king's house to do their duty. It is difficult to prove a negative as to the contents of the Year Books, but I do not think they contain any reference to this offence. There is no such title as 'Perjury' in Broke's Abridgment. One case only is referred to in Fitzherbert, under the title 'Parjure.' In this instance a man was fined and imprisoned for representing his property as greater than it really was when he offered himself as bail, which might be regarded as a contempt of Court. The subject is not mentioned either by Staundforde or Lambard, nor in the original edition of Dalton's Justice. Perjury was no doubt regarded as a spiritual offence. Several cases of prosecutions for it are to be seen in Archdeacon Hale's Ecclesiastical Precedents (Nos. 75, 77, 93, 131, 146, 147, 200). Most of them refer to matters of ecclesiastical cognizance, such as

[1] The book is said to have been written at the end of Edward III.'s reign, or the beginning of Richard II. See Selden's note on Fortescue, p. 15.

incontinence, but one relates to a common transaction of business. "Johannes Traford notatur super crimine perjurii, eo quod non solvit M. R. Spencer [blank in the original], quos promisit solvere." This procedure was jealously watched by the Courts of Common Law. Two cases occur in the Year Books (2 Hen. 4, p. 10, No. 45; and 11 Hen. 4, p. 88, No. 40), in which a prohibition went to the Spiritual Court to restrain them from inquiring into false oaths, or rather breaches of promissory oaths relating to temporal matters, upon the ground that such an inquiry was an indirect way of determining temporal questions. In the second of the cases referred to the report says, "It happened in the King's Bench that a man had sworn to make a feoffment of land, and for not doing so he was prosecuted in the Court Christian as for perjury, and because by this means he might be forced to perform a thing touching land and inheritance, the same course was taken as if he had been sued for the land itself in the Court Christian," *i. e.* a prohibition was granted.

It is not at all improbable that this strange defect in the law may have had an influence upon the prevalence of perjury, which Mr. Hallam notices as one of the most characteristic vices of the Middle Ages.

The history of our existing law on the subject is also curious and instructive. The first statutory reference to perjury, as far as I know, is to be found in the statute 3 Hen. 7, c. 1, which established, or at all events greatly strengthened and extended the power of, the Court of Star Chamber.

This statute recites the bad effects of various crimes such as maintenance, riots, unlawful assemblies, and the like, and enumerates "the increase of murders, robberies, perjuries, and unsureties of all men living" as their effect. It then proceeds to give the court power to call before them "the said misdoers." The Star Chamber considered that this authorized them to punish perjury, though the words seem not to bear that interpretation. Temporal penalties were first imposed upon the offence by the statute 32 Hen. 8, c. 9, s. 3 (A.D. 1540), which punished subornation of perjury in certain cases by a fine of £10, but left perjury itself unpunished. The money was to be sued for by a common informer. This was followed in 1562 by the 5 Eliz. c. 9, which punishes subornation of perjury in certain special cases and courts with a penalty of £40, and perjury itself with a penalty of £20. In each case there is an alternative punishment of six months im-

prisonment and pillory in case of nonpayment, besides certain incapacities. These enactments obviously regard perjury simply as a branch of the general offence of maintenance or oppression by iniquitous lawsuits, which was in those days an offence of great frequency and importance.

That this account of the state of the law in the 16th century is correct is expressly stated in the case of *Devonport* v. *Sympson*, Cro. Eliz. 520, decided in 1596. It was an action against a man who falsely swore that the value of certain plate was only £180 and not £500, whereby the plaintiff recovered less damages for the loss of the plate than he was entitled to. The jury gave £300 damages. "And it was moved in arrest of judgment that the action lay not; for the law intends the oath of every man to be true; and, therefore, until the statute of 3 Hen. 7, c. 1, which gives power to examine and punish perjuries in the Star Chamber, there was not any punishment for any false oath of any witness at the common law: and now there is a form of punishment for perjury provided by the statute of 5 Eliz. c. 9. And if this action should be allowed, the defendant might be twice punished, viz., by the statute, and by this action, which is not reasonable. And of that opinion were Walmsley, Beaumond, and Owen, that this action lies not; for at the common law there was not any course in law to punish perjury: but yet before the statute of 3 Hen. 7, c. 1, the king's council used to assemble, and punish such perjuries at their discretion. And if he should be punished in law by this action, there would be some precedent of it before this time: but being there is not any precedent found thereof, it is a good argument that the action is not maintainable. And it appears by Dyer, 242, that at the common law there was no punishment for perjury but in case of attaint; but in the spiritual court *pro lœsione fidei* in cases spiritual they used to punish them; and here they would in this action draw in question the intent of the jurors what greater damages they would have given, unless for this oath, which is secret and cannot be tried; and therefore to punish a man for his oath upon a secret intent would be hard; and if this might be suffered, every witness would be drawn in question. Wherefore upon these reasons they held that this action lay not, and gave judgment for the defendant, against the opinion of Anderson, who conceived the action was maintainable."

The present law upon the subject, which is to be found in all the common textbooks, is represented by the Article in the

ext. It is fully recognised in a variety of Acts of Parliament and many decided cases, and is in daily use. It rests, however, simply upon a usurpation of the Court of Star Chamber, which, as Coke tells us (3rd Inst. 164), decided in the year 1613 "that perjury in a witness was punishable by the common law," in the case of *Rowland ap Eliza.* This decision appears to me to be inconsistent, not only with the case in Croke, and the silence of the Year Books, but also with the statutes of Henry VIII. and Elizabeth, which, if perjury had been an offence at common law, would have been useless. The erection of the crime into an offence at common law is, no doubt, of the boldest, and, it must be added, one of the most reasonable acts of judicial legislation on record. The definition of the crime, however, has at least one serious defect, which is directly traceable to its origin. Coke's definition includes the doctrine of materiality in perjury. In explaining that part of his definition which says that the false oath must be "in a matter material to the issue or cause in question," he adds, "for if it be not material, then, though it be false, yet it is no perjury, because it concerneth not the point in suit, and therefore in effect it is extrajudicial. Also this Act" (he seems to refer to 5 Eliz. c. 9, which, however, does not contain the words introduced into his definition) "giveth remedy to the party grieved, and if the deposition be not material, he cannot be grieved thereby. And Bracton says, '*Si autem sacramentum fatuum fuerit, licet falsum, tamen non committit perjurium.*'" Coke misunderstands Bracton, for Bracton goes on to say, "quia jurat secundum conscientiam eo quod non vadit contra mentem," which shows that he was not speaking of wilful falsehood in a material point, but, as appears from many other places in the same passage, of cases of honest mistake. Bracton's authority, therefore, does not warrant Coke's observation. Probably this part of Coke's definition was an adaptation of a part of the old law of attaint, which is thus expressed in the case of *Foster* v. *Jackson*, Hobart, 53, also decided in 1613: "If the jury find anything that is merely out of the issue, that such a verdict for so much is utterly void . . . . If that extravagant part of the verdict be false, it is no perjury, neither doth any attaint lie upon it, for there is no party grieved, nor anything to be restored, neither can it be used as evidence in any other trial, because there is no redress if it is false." This is intelligible and rational, but the modern doctrine of materiality is a mere distortion of it. It is one thing to say that a verdict is

not to be received as false because an immaterial part of it is false, and quite another to say that a wilful perjury about a particular fact is not to be punished because the fact is not material to the issue. However, upon this passage of Coke's a variety of cases were decided (see 1 Hawkins, P. C. 433–5) which introduced a doubt whether perjury could be committed about a fact which, though relevant to the issue, was not essential to its determination, and the doctrine became so well recognised as a part of the law that an averment of the materiality of the matter on which perjury is assigned forms a necessary part of every indictment for the offence.[1] Of late, however, the judges have given so wide an interpretation to the word "material" that the rule has ceased to do much harm. It is difficult to imagine a case in which a person would be under any temptation to introduce into his evidence a deliberate lie about a matter absolutely irrelevant to the cause before the Court. A way of interpreting the law as to materiality was suggested by Maule, J., in *R.* v. *Phillpot* (2 Den. 306), which would practically get rid of the doctrine altogether. He said, "Were the defendant by means of a false oath endeavours to have a document received in evidence, it is, therefore, a false oath in a judicial proceeding. *It is material to that judicial proceeding, and it is not necessary that it should have been relevant and material to the issue being tried.*"

I have not thought it necessary to introduce into the text any article founded upon the statutes of Henry VIII. and Elizabeth, as they are practically obsolete. Besides which the doctrine to which the Star Chamber gave the name of common law is wider than those statutes, so that no case could well occur in which it would be necessary to put them in force.

Many enactments provide that the making of false declarations upon oath or affirmation in relation to particular matters shall be deemed to be perjury. It does not fall within the plan of this work to notice them.

NOTE VIII.

(TO ARTICLE 141; MAINTENANCE).

It is not without hesitation that I have inserted these vague and practically obsolete definitions in this book. As, however, maintenance and champerty hold a place in all the text books, I have

[1] See particularly *R.* v. *Gibbon*, quoted in the Illustrations.

not thought it proper to omit all notice of them. A full account of the crimes themselves, of the vagueness of the manner in which they are defined, and of the reasons why they have so long since become obsolete, may be seen in the Fifth Report of the Criminal Law Commissioners, pp. 34–9. The Commissioners observe in conclusion: "Prosecutions for offences comprehended under the general head of maintenance are so rare that their very rarity has been a protection against the disapproval of judges, and those alterations which a frequent recurrence of doubt and vexation would probably have occasioned. . . . But although no cases have occurred where the doctrine of maintenance has been discussed in the Courts, it is by no means true that this law has not been used as the means of great vexation. Instances of this have fallen within our own professional observation in the case of prosecutions commenced, although not persevered in." The Commissioners recommend that all these offences should be abolished. The definition of barratry in particular is so vague as to be quite absurd; and the statutory provision as to attorneys practising after a conviction would be utterly intolerable if it had not been long forgotten. I should suppose that there is no other enactment in the whole statute book which authorises any judge to sentence a man to seven years penal servitude after a summary inquiry conducted by himself in his own way.

These offences, as sufficiently appears from the preambles of the various statutes relating to them, are relics of an age when courts of justice were liable to intimidation by the rich and powerful and their dependants. As long as the verdict of a jury was, more or less, in the nature of a sworn report of local opinion, made by witnesses officially appointed to make such reports, intimidation must have been possible, and, in many cases, easy. Many statutes on this subject[1] are still in force, and the law relating to it is to be found in 1 Hawkins, 454. The exceptions to the general rule, that a man is not to assist another in a quarrel in which the maintainer has no interest, are so numerous, and, in some cases, so vague (*e. g.*, a man may assist his neighbour from charity), that no less vague proposition than the one in the text would faithfully represent the law.

[1] 3 Edw. 1, c. 25; 13 Edw. 1, c. 49; 28 Edw. 1, c. 11; 20 Edw. 3, c. 4; 1 Ric. 2, c. 4; 7 Ric. 2, c. 5; 32 Hen. 8, c. 9.

NOTE IX.

(TO ARTICLES 156, 157).

These offences have, at least in modern times, been made the subject of few, if of any, prosecutions. The excessive severity of the judgment for misprision of treason no doubt escaped notice when forfeitures for felony were abolished. The 33 & 34 Vict. c. 23, takes no notice of misprisions.

The definition of misprision of felony is extremely vague. I have found no authority as to what amounts to a concealment. The obligation to discover treason to a judge or magistrate is mentioned by Hale. In early times, when the offence was commoner and more important, the obligation was very clearly set forth. "Si sit aliquis qui alium noverit indo" (*i.e.* of treason) "esse culpabilem, vel in aliquo criminosum, statim et sine intervallo aliquo accedere debet ad ipsum regem si possit, vel mittere si venire non possit ad aliquem regis familiarem et omnia ei manifestare per ordinem. Nec enim debet morari in uno loco per duas noctes vel per duos dies antequam personam regis videat, nec debet ad aliqua negotia quamvis urgentissima se convertere, quia vix permittitur ei ut retro aspiciat." Bracton, Lib. iii., fo. 118 *b*.

NOTE X.

(TO ARTICLE 168).

This crime was anciently punished by death, if we are to believe Britton and Fleta;[1] but the silence of Bracton on the subject, the contradiction between Britton, who speaks of burning, and Fleta, who mentions burying alive[2] as the punishment, and the fact that the offence was made a felony by 25 Hen. 8, c. 6, lead me to believe that till Henry VIII.'s reign it was treated as an ecclesiastical offence only.

It was punishable by death from 1534 till 1861 (though of late years the sentence was seldom executed), when the present punishment was provided by the Offences against the Person Act. It is almost the only case in which recent legislation has affixed a minimum punishment to any offence whatever.

I think the proper place for the crime in a Code is that in which I

[1] Br. c. 9; F. 1, 37.

[2] Cf. Tacitus, Germany, ch. xii.

have placed it. Where there is no violence, it hardly seems appropriate to describe it as an offence against the person, and where the crime (as is almost always the case) is committed with an animal, the impropriety of such a classification is more distinctly marked.

NOTE XI.

(TO ARTICLE 172).

The latter part of this article is grounded partly upon general considerations and partly upon the case referred to in the Illustrations. Further illustrations of the same principle might easily be given. For instance, the publication of an edition of Juvenal, Aristophanes, Swift, Defoe, Bayle's Dictionary, Rabelais, Brantôme, Boccaccio, Chaucer, &c., cannot be regarded as a crime; yet each of these books contains more or less obscenity for which it is impossible to offer any excuse whatever. I know not how the publication of them could be justified except by the consideration that upon the whole it is for the public good that the works of remarkable men should be published as they are, so that we may be able to form as complete an estimate as possible of their characters, and of the times in which they lived. On the other hand, a collection of indecencies might be formed from any one of the authors I have mentioned the separate publication of which would deserve severe punishment.

In scientific matters the line between obscenity and purity may be said to trace itself, as is also the case in reference to the administration of justice. It may be more difficult to draw the line in reference to works of art, because it undoubtedly is part of the aim of art to appeal to emotions connected with sexual passion. Practically I do not think any difficulty could ever arise, or has ever arisen. The difference between naked figures which pure-minded men and women could criticise without the slightest sense of impropriety, and figures for the exhibition of which ignominious punishment would be the only appropriate consequence, makes itself felt at once, though it would be difficult to define it.

NOTE XII.

(TO ARTICLES 179–184).

There is a good deal of difficulty in bringing into a clear and systematic form the provisions of the various statutes relating to

the suppression of disorderly houses, and especially gaming-houses. I think, however, that the text represents their effect with substantial accuracy.

The matter stands thus. The earliest Act upon the subject now in force is 33 Hen. 8, c. 9, "An Act for Maintenance of Artillery and Debarring of Unlawful Games." This Act was intended to compel people to practise archery by making all other amusements unlawful, and it accordingly forbids by name bowls, quoits, tennis, and various other games, cards and dice, and all other unlawful games prohibited by any of the statutes which it repealed, as well as all other unlawful games to be subsequently invented. The expression "unlawful games" is nowhere defined, unless it means every amusement except archery.

By the 10 Will. 3, c. 23, lotteries were forbidden. By the 12 Geo. 2, c. 28, "the games of ace of hearts, pharaoh, basset and hazard," were declared to be lotteries, and, as well as what we now call raffles, were forbidden under penalties. By the 13 Geo. 2, c. 19, the same course was taken as to a game called passage, "and all other games invented or to be invented with one or more die or dice," backgammon only excepted. By 18 Geo. 2, c. 34, these enactments were extended to "a certain pernicious game called roulet or roly poly," and that game and "any game at cards or dice already prohibited by law," were prohibited afresh.

The 8 & 9 Vict. c. 109, repeals so much of the Act of Henry VIII. as relates to games of mere skill, and provides that upon any information or indictment for keeping a common gaming house "it shall be sufficient to prove" the matter stated in Article 183.

This enactment was passed in order to dispose of doubts that apart from its provisions it would have been necessary to prove that the parties played at one of the games specifically prohibited by the Acts of Geo. II., or at one of the games of chance prohibited by the Act of Henry VIII.

NOTE XIII.

(General Note to Part V.)

The arrangement of this part, and in particular the composition of Chapters XXI and XXII, has been the most difficult portion of the task of preparing this Digest. No one who has not made a special study of the subject, can have any adequate notion of the extreme confusion of the authorities, or of the difficulty of extracting any-

thing systematic and definite from a number of scattered hints and isolated decisions upon particular cases—mostly relating to the law of homicide. Upon a full examination of the authorities on this subject it appeared to me that the law contained in them ought to be divided into four parts; namely:—1. Cases in which it is not criminal to inflict death, or bodily harm intentionally. These are the execution of legal sentences, keeping the peace, prevention of crime, self defence, the use of lawful force, consent and accident. The expression "lawful force" is unavoidably vague. To enumerate every case in which the use of personal violence may be justified would be inconsistent with the scheme of this work. It would, for instance, be going beyond the limits of criminal law to inquire into the extent of the right of correction vested in parents, masters, captains of merchant ships, &c., or of the right of the owner of a personal chattel to take it away from a trespasser, or to try to enumerate all the cases in which civil and criminal process may be executed by the use of force, and the conditions necessary to make it legal. I have accordingly confined myself to the general principles stated in Articles 200–201.

2. Cases in which the infliction of death or bodily harm by omissions is or is not criminal. Injuries caused by the omission to do an act which the negligent person is under a legal duty to do stand on the same footing as injuries caused by unlawful acts. It is, therefore, necessary to define the commoner and more important of the legal duties which tend to the preservation of life. I have, therefore, deduced them in Chapter XXII. from the different decisions in which a violation of them has been held to occur. Of course the chapter does not contain an exhaustive list of all the duties which might tend to the preservation of life under particular circumstances, though I hope it notices the most important of them.

3. Cases relating to homicide generally and apart from the distinction between murder and manslaughter. Such are the point of time at which a child becomes a human being, the degree of connection between an act and the death caused by it necessary in order to enable us to say that the agent has killed the deceased, and the case in which the act done is not the sole cause of death. Thus, if an unborn child receives an injury of which it dies before it is fully born, the infliction of the injury cannot be either murder or manslaughter. If it dies after it is fully born the infliction of the injury may be either justifiable homicide, accidental homicide,

manslaughter, or murder, according to circumstances. This makes it possible to enumerate the cases in which homicide is unlawful, and so to give a specific meaning to the expression "unlawful homicide."

4. The definition of malice aforethought. Unlawful homicide must be manslaughter at least, and may be murder if it is accompanied by malice aforethought; and, after dealing with this the transition to the less serious bodily injuries, felonious or otherwise, is easy.

When this division of the subject is carried out it looks simple; at least, I hope so; but any one who will try the experiment of referring to the authorities will believe me when I assert that it cost me weeks of thought and labour to put the matter in this shape. I believe, however, that it is now not very incomplete.

The table on p. 353 shows, I think, that every imaginable kind of homicide has been considered, and has been classified as lawful or unlawful in some part or other of Chapters XXI., XXII., and XXIII., and if this be so the definitions of murder and manslaughter must also be complete.

This table gives seven distinct kinds of homicide, as follows:—

1. Homicide by an act accompanied by a lawful intention to kill or hurt (Chapter XXI.).

2. Homicide by an act accompanied by an unlawful intention to kill or hurt (Article 222 (*a*)).

3. Homicide by an act in itself lawful, and not accompanied by an intention to kill or hurt (Article 210).

4. Homicide by an act in itself unlawful, but not accompanied by an intention to kill or hurt (Article 222 (*c*)).

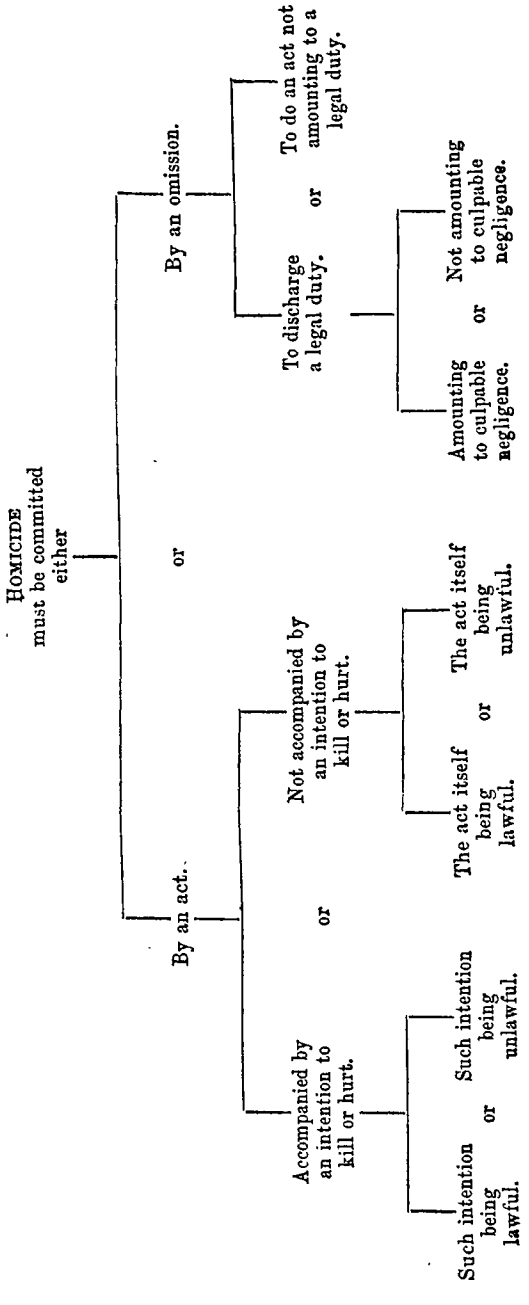
5. Homicide by an omission to discharge a legal duty amounting to culpable negligence (Chapter XXII., Article 222 (*b*)).

6. Homicide by an omission to discharge a legal duty not amounting to culpable negligence (Article 211.)

7. Homicide by an omission to do an act not amounting to a legal duty (Article 212).

Of these Nos. 1, 3, 6, and 7 are not unlawful in the sense of being criminal. Nos. 2, 4, and 5 are unlawful. Every act falling within these definitions must be manslaughter at least, and may be murder if it is accompanied by malice aforethought, as defined in the next chapter, and is not provoked.

Unless some kind of homicide can be suggested which is not comprehended in one or other of these classes, the subject is exhausted in these chapters.


Homicide must be committed either
or
By an act.
By an omission.
Accompanied by an intention to kill or hurt.
Not accompanied by an intention to kill or hurt.
To discharge a legal duty.
To do an act not amounting to a legal duty.
Such intention being lawful.
Such intention being unlawful.
The act itself being lawful.
The act itself being unlawful.
Amounting to culpable negligence.
Not amounting to culpable negligence.

(ARTICLE 223.)

DEFINITION OF MURDER AND MANSLAUGHTER.

This definition represents the solution at which I have arrived after much consideration of one of the most difficult problems presented by the criminal law—the problem of giving in a short compass the result of a great number of decisions and statements by authoritative writers upon the subject of murder.

I do not propose in this note to examine the history of the law on this subject, or to enter into any inquiry as to its merits and demerits. I propose simply to shew that it is stated correctly in the text. It will be sufficient for this purpose to shew, first, that the definition which I have given coincides with the theory laid down by the authorities on the subject; and secondly, that all the points decided by the various cases relating to any form of homicide are comprehended in what I have said on the subject in the different articles contained in Chapters XXI.—XXIV. both inclusive, for the various decisions in question range over all the subjects treated of in those chapters indiscriminately. The first of these points I shall try to establish by showing that my definition of murder and manslaughter respectively will be found upon examination to be equivalent to what is stated in Coke's 3rd Institute, Chapters VII. and VIII., 1 Hale's Pleas of the Crown, pp. 411–502 (Chapters XXXI.—XLII. both inclusive), and Foster's Discourse on Homicide (Crown Law, 255—337). The existing law on the subject is founded mainly upon these works, and the almost innumerable decisions bearing upon the subject are all applications of the theory which is there laid down. The decisions have been collected more or less fully, and arranged in a more or less satisfactory way, by various writers, but for every practical purpose the collection contained in Russell on Crimes is sufficient, though in point of arrangement it is, I think, inferior to the older work of East.[1] It fills 212 pages (640–852) of the first volume of the 5th edition, and 222 pages (667–898) of the 4th edition, to which I refer.

[1] Only two decisions on the subject of the law of murder of any great importance were given between 1865, when the 4th edition of Russell was published, and 1876, when the 5th edition was published. These decisions not having been reported in the ordinary law reports, have not been noticed in the last edition of Russell. They are the cases of *R.* v. *Allen and Others*, the Fenians, tried at Manchester for the murder of the policeman Brett, in 1867, and the case of *R.* v. *Desmond and Others*, for killing people by blowing up the wall of Clerkenwell Prison, in 1868.

After establishing the correctness of the general definition in the manner already described, I will give an analysis of the collection of cases in Russell, and shew how each group of cases is accounted for in the text of the Digest. The intricacy, confusion, and uncertainty of this branch of the law may be traced to the statute 23 Hen. 8, c. 1, s. 3, which took away benefit of clergy in cases of "wilful murder of malice prepensed," and which thus created the necessity of preserving the expression, "malice prepense," and at the same time explaining it away. Coke endeavoured to effect this by the doctrine of constructive or fictitious malice, of which, if not the author, he was the most conspicuous expounder, and he showed in his exposition of it that utter incapacity for anything like correct language or consecutive thought which was one of his great characteristics. Hale amplifies Coke, Foster rationalizes Hale, and the judges have, in an unsystematic occasional way worked out, bit by bit, the result recorded in the text.

According to Coke malice aforethought is the criterion by which murder is distinguished from manslaughter. Malice may be either express or implied.

[1] "Malice prepensed is where one compasseth to kill, wound, or beat another and doth it *sedato animo*."

[2] "Malice implied is in three cases:—

"First, in respect of the manner of the deed, as if one killeth another without any provocation of the part of him that is slain, the law implieth malice.

"Second, in respect of the person slain. As if a magistrate or known officer, or any other that hath lawful warrant, and in doing

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Neither of these cases is reported in the common reports. I have quoted what was said by Lord Chief Justice Cockburn in *Desmond's Case* in Art. 223, Illust. (8), and I have reprinted in the note next following from the *Times*, the correspondence which passed between the counsel for the prisoner and Lord (then Mr. Justice) Blackburn, in *R.* v. *Allen and Others*. Though not in form it constitutes in fact an argument and a written judgment on a very important point. The difference of ten pages between the collection of cases in the 4th and the collection in the 5th edition of Russell is owing to the circumstance that in the 4th edition a large number of cases are referred to twice over, once in order to show what degree of provocation reduces murder to manslaughter, and again in order to show what amount of provocation justifies a charge of manslaughter as distinguished from murder. A cat is produced twice, first to show the difference between tigers and cats, and again to show the resemblance between cats and tigers.

[1] 3rd Inst. 51.

[2] Ibid. 52.

or offering to do his office or to execute his warrant, is slain, this, is murder by malice implied in law, as the "[1] person killed is "the minister of the king.

"Third, in respect of the person killing. If A assault B to rob him, and in resisting A killeth B (i.e. if B resists and A kills him) this is murder by malice implied, albeit he" (A) "never saw or knew him" (B) "before."

These passages, overloaded, as Coke's manner is, with a quantity of loose rambling gossip, form the essence of his account of murder.

Hale, who arranges his matter more systematically (though he also is exceedingly confused), [2] adopts Coke's theory in slightly different language. "Such a malice, therefore, that makes the killing of a man to be murder is of two kinds: 1. Malice in fact, or 2, malice in law, or *ex præsumptione legis.*"

"Malice in fact is a deliberate intention of doing some corporal harm to the person of another."

"Malice in law, or presumed malice, is of several kinds, viz., 1. In respect of the manner of the homicide, when without provocation. 2. In respect of the person killed, viz., a minister of justice in the execution of his office. 3. In respect of the person killing." (As to which he [3] afterwards repeats Coke in an abridged form.)

Manslaughter, Coke [4] tells us (in the middle of a bewildering chapter about homicide in general) is homicide, "not of malice forethought" [but] "upon some sudden falling out."

Manslaughter is treated by Hale in a manner so meagre and yet so confused, that no notion of it can be obtained except by reading through Chapters XXXVIII.–XL., and trying to make sense of them. Hale's whole definition of the offence is in these words, "Manslaughter, or simple homicide, is the voluntary killing of another without malice express or implied."

These definitions are open to the remark that the definition of express malice includes all the three cases of implied malice.

Express malice, means the deliberate intentional infliction of bodily harm. Malice is implied if the act is done without provocation, or in resisting an officer of justice, or in committing a crime

[1] The sentence here is not even grammatical.

[2] 1 Hale, P. C. 451.

[3] Page 465.

[4] 3rd Inst. 55.

But in each of these cases the infliction of bodily harm must be intentional, and there is no reason why in each of them it should not be deliberate.

Thus the distinction between express and implied malice is a distinction without a difference.

It has involved the whole subject in an obscurity from which it can never be rescued except by legislation, though I think the way in which it is stated in the text is correct, and may contribute to dispelling the confusion.

Coke's theory, however, and that of Hale may be exhibited in the following propositions:—

1. Unlawful killing by any sort of premeditated intentional personal violence is murder.

2. Premeditation is to be presumed if the violence is intentional and unprovoked.

3. Unlawful killing by unpremeditated intentional personal violence is murder if the violence is employed in the commission of a crime or in resistance to lawful authority.

4. Unlawful killing by unpremeditated intentional violence provoked, is manslaughter.

These four propositions may be also stated thus—so as to show their connection:

Unlawful killing by any sort of intentional personal violence is murder, unless such violence is used "upon a sudden falling out," constituting provocation to the offender, but neither the exercise of force by an officer of justice against an offender, nor resistance to the offender by a person against whom a crime is attempted, constitutes such a provocation, and killing in such cases is murder.

That this proposition is the equivalent of the four propositions given above is thus proved:

[1]All intentional violence must be either provoked or unprovoked.

[1] This may be expressed thus in a tabular form:—

Intentional Violence must be	Premeditated or	Unpremeditated.
Provoked ... ... or	Murder by proposition 1.	Not murder by proposition 4, except in cases under proposition 3.
Unprovoked ...	Murder by proposition 1.	Murder by proposition 2.

All intentional violence must be either premeditated or unpremeditated.

Killing by premeditated intentional personal violence is murder by (1).

Killing by unpremeditated, unprovoked, intentional personal violence is, by (2), equivalent to killing by premeditated intentional personal violence, and is therefore murder. Therefore all killing by intentional personal violence is murder, unless such violence is both provoked and unpremeditated.

By (3) killing by intentional personal violence unpremeditated, and provoked only by the exercise of lawful force in the ways mentioned, is murder.

Therefore the four propositions are equivalent to the one last stated.

The legal character of unintentional killing was held by Coke and Hale to depend on the character of the act by which death was caused. If the act was unlawful the offence was murder. If lawful the death was killing by misadventure, which, in Hale's time, seems to have covered, at all events in part, the ground now occupied by manslaughter by negligence. As to this Hale says:—[1] "Though the killing of another *per infortunium* be not in truth felony, nor subjects the party to a capital punishment, though it was not his crime, but his misfortune, yet, because the King hath lost his subject, *and that men may be more careful*, he forfeits his goods, and is not presently absolutely discharged of his imprisonment, but bailed," &c.

Upon the whole, the law as to unlawful homicide, as understood by Coke and Hale (the effect of what they say on justifiable homicide is given in Chapter XXI.) may be summed up as follows:—

Murder is unlawful killing

(*a*) by any intentional personal violence not inflicted upon a sudden falling out;

(*b*) by any unintentional personal violence inflicted in an unlawful act.

Manslaughter is killing by any intentional personal violence inflicted upon a sudden falling out, provided that if a man attempting to commit a crime upon another is resisted, and kills the person resisting, or if a man resists an officer of justice in the exercise of his duty, and kills him, the offence is murder, and not manslaughter, although there is something which may be described as a sudden falling out between the parties.

[1] 1 Hale, P. C. 477.

The following theory was collateral to this definition, and was supposed to be its basis:—

In all murder there is malice aforethought. In murder as defined in (*a*) there is express malice aforethought if the circumstances show premeditation. There is implied malice aforethought if the act was done suddenly, and without provocation.

In murder as defined in (*b*), and in the proviso to the definition of manslaughter, the malice is always implied.

In manslaughter there is no express malice aforethought, and it is not thought proper to imply it.

These explanations show the true nature and real use of the expression "malice aforethought"—a mere popular phrase unluckily introduced into an Act of Parliament, and half explained away by the Judges. It throws no light whatever on the nature of the crime of murder, and never was used in its natural sense of premeditation. On the other hand, it served as a sort of standing hint at the kind of definition which was wanted, for it was equivalent to saying that there were two degrees of homicide—homicide with premeditation, or other circumstances indicating the same sort of malignity; and homicide provoked by a sudden quarrel, or accompanied with other circumstances indicative of a less degree of malignity.

Foster's discourse on Homicide is little more than an amplification of this thesis. He goes through all the principal cases which had been decided in his time, and compares them with the theories of Hale and Coke, drawing the conclusion that malice means "that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief;"[1] a principle more shortly expressed by Holt, L. C. J., in the words, "He that doth a cruel act voluntarily doth it of malice prepensed."[2]

This principle gives its due prominence to a distinction which appears to have been quite unknown to Coke, though it had attracted the attention of Hale, and is, one would think, obvious enough in itself, the distinction, namely, between causing death

[1] Foster, 256.

[2] *R.* v. *Mawgridge*, Kelyng (3rd ed.), 174. This judgment contains an admirable summary of the law of murder and manslaughter as it was understood in the beginning of the eighteenth century

unintentionally by an act likely to cause death, and causing death unintentionally by an act unlikely to cause death.

According to Coke[1] and Hale,[2] a settled design to beat a man makes killing him by such beating murder. Hale, however, seems to doubt whether, if the beating was moderate, the killing might not be manslaughter, and mentions[3] one case in which, a soldier having killed a woman who abused him by throwing a broomstick at her, the judges were divided on the question whether the act was murder or not, and recommended a pardon. This view of the matter is developed at length by Foster, who discusses many cases in connection with it, and may be regarded as having laid the foundation of the modern doctrine on the subject, which has since his time been recognised in a vast number of cases, that the general presumption of malice which arises from the fact of killing is rebutted if it appear that the means used were not likely to cause death.

Foster to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence, by confining it to cases in which the unintentional violence is offered in the commission of a felony. This rule has in modern times had a singular and unexpected effect. When Coke and Hale wrote, the infliction of hardly any bodily injury[4] short of a maim was a felony. Cutting with intent to disfigure was made felony by the Coventry Act; shooting was made felony by what was called the Black Act; and by later statutes it has been provided that the intentional infliction of grievous bodily harm in any way whatever shall be felony (see Article 236 (*a*)). The result is that Foster's rule as to the intent to do grievous, as distinguished from minor, bodily harm being essential to malice aforethought now rests on statutory authority, for no one can intentionally inflict on another grievous bodily harm without committing a felony, and to cause death by a felonious act is murder.

The law as to homicide by omission is more modern, but closely follows the lines of the older part of the law. The authorities on it will be found in the Illustrations.

I now pass to the cases, and propose to show, by going through

[1] 3rd Inst. 50.

[2] 1 Hale, P. C. 472.

[3] 1 Hale, P. C. 456.

[4] Cutting out the tongue, or putting out the eyes, was felony by 5 Hen. 4, c. 5.

the collection contained in 1 Russell, Cr. pp. 667–898, that all the points which have been decided are included in one part or another of the Digest—I hope in a more intelligible order.

These cases fill the first three chapters of the Third Book, which chapters are entitled:—

1. Of murder; pp. 667–782.
2. Of manslaughter; pp. 783–882.
3. Of excusable and justifiable homicide; pp. 883–898.

Pages 667, 668 contain extracts from the text writers as to malice; as to which see the earlier part of this note, also the rule of evidence embodied in Article 230.

669. Provocation no answer in cases of express malice. Art. 225. Party killing must be a free agent. See Article 27.

670–674. Cases as to the time when a child becomes a human being. Art. 218.

Means of killing:—

675. If probable consequence of act is death, it is murder. Art. 223 (*b*), (*c*), and see Illustration 5.

676. Forcing a person to kill himself is murder. Art. 220 (*c*).

677. Harsh treatment of an apprentice. Art. 221 (*b*). Illustration (1).

678–686. Cases on causing death by omission to supply necessaries, and on the extent of the legal duty of doing so. See Chapter XXII.

687. Savage animals. Art. 216.

688–699. Homicide by medical men. Art. 217.

699. Lord Hale's *quære* as to infection. Art. 221, note (2).

700. Year and a day. Art. 221 (*a*).

700–702. Treatment of wounds being the immediate cause of death. Art. 220 (*a*).

702, 703. Killing a person labouring under a disease. Art. 220 (*d*).

703. Poisoning (superfluous).

703–706. Suicide and accessories to suicide. Art. 227.

706–710. Accessories before and after the fact. See Chapter IV.

710. Punishment. Art. 231.

Petit treason abolished (superfluous).

The general part of Chapter I. is followed by seven sections, as follows:—

Sect. 1. Provocation; pp. 711–727.
„ 2. Mutual combat; pp. 727–732.
„ 3. Resistance to officers of justice and others; pp. 732–738.

Sect. 4. Killing in prosecution of an unlawful act; pp. 739–746.

„ 5. Killing in consequence of a lawful act improperly performed; pp. 747–752.

„ 6. Indictment and trial (under which is included the law as to concealment of birth[1]); pp. 753–780.

„ 7. Judgment and execution; pp. 780–782.

SECT. 1. *Provocation.*—Pages 711–727.

Pages 711–717. Words, &c., no provocation. Art. 224 (*f*).

712. Act of killing without adequate provocation a form of malice. Art. 223.

Words of menace. Art. 224 (*f*).

713–716. Provocation by assault. Art. 224 (*a*). And see Art. 225.

716–727. Intention to kill or do personal bodily harm is one test as to murder and manslaughter. Art. 223 (*a*).

Much of this is to the same purpose as pp. 713–716. Art. 225.

SECT. 2. *Cases of Mutual Combat.*—Pages 727–732.

Page 727. Deliberate duelling is murder. Art. 207.

730–732. Major Oneby's case (and others); provocation. Art. 225.

SECT. 3. *Resisting Officers of Justice executing Legal Process.*—Pages 732–738.

Art. 223 (*d*).

SECT. 4. *Cases where the killing takes place in the prosecution of some other criminal, unlawful, or wanton act.*—Pages 739–746.

Pages 739–742. Cases in which one person was killed by injury designed for another, Art. 223 (*a* and *b*); and cases in which death was caused by an injury not intended to cause death, but inflicted in the commission of a felony. Art. 223 (*c*).

742–746. Cases in which all the persons joining in a common enterprise are responsible for the act of any one. See Chapter IV. on accessories.

[1] This strange arrangement is suggested by the circumstance that a woman indicted for murder may be convicted of concealment. This is as bad a specimen of arrangement as the introduction of the plea of *autrefois acquit* under the head of burglary. It is fair to say that the credit of these additions is due to the late Sir William Russell, and not to his editors. After all, it is not more surprising than the arrangement (if such it can be called) of the Pandects.

SECT. 5. *Killing by a lawful act criminally or improperly performed.*—Pages 747–752.

A "lawful act criminally performed" is a contradiction in terms. If a police officer arrests a thief who neither resists nor runs away by giving him a violent blow on the head, it is as absurd to call the blow a "lawful act criminally performed," because the arrest might have been lawfully made, as it would be to call picking a pocket a lawful act criminally performed, because the thief had a right to walk along the street without picking pockets.

A lawful act improperly performed can mean only culpable negligence in the performance of a lawful act. The cases in this section are accordingly superfluous. All of them fall directly under the definitions of murder or manslaughter given in Articles 223, 224. Thus, for example, in *R.* v. *Smith* (p. 749), A. shoots B. dead for pretending to be a ghost and frightening people. This was held to be murder. It would fall under Articles 222 and 223, thus:—It was unlawful homicide, because the death was done by an act intended to cause bodily harm not falling within any of the exceptions specified in the article. The homicide was with malice aforethought, because the intention was (if not to kill) at least to cause grievous bodily harm.

In *R.* v. *Hopley* (p. 751) a schoolmaster was convicted of manslaughter for flogging a boy with extreme severity. Here the homicide was unlawful, because the act which caused death was intended to cause bodily harm, and was not within the exceptions (see particularly Art. 204). If the prisoner had been indicted for murder (as Mr. Greaves thinks he ought to have been, and I agree with him), the question for the jury would have been whether or not his acts were such as, according to common knowledge, would cause death or grievous bodily harm.

SECT. 6. *Indictment, Trial, &c.*—Pages 753–774.

This is foreign to my purpose.

Pages 774–780. Concealment of the birth of children. See Article 235.

SECT. 6. *Judgment and Execution.*—Pages 780–782.

As to judgment, see Articles 231, 232.

Execution is part of the law of procedure; but see Art. 231, note (1).

Chapter II. relates to manslaughter; pp. 783–882.

Page 783. The page begins by defining manslaughter (see Art. 223).

The rest of the page is about accessories in manslaughter (see Art. 229).

The rest of the chapter is divided into six sections:—

Sect. 1. Provocation; pp. 784–790.
„ 2. Mutual combat; pp. 790–798.
„ 3. Resistance to officers of justice, &c.; pp. 798–848.
„ 4. Killing by an unlawful act; pp. 849–856.
„ 5. Lawful act improperly performed; pp. 856–880.
„ 6. Indictment and judgment; pp. 880–882.

The greater part of the matter of these six sections repeats what is contained in the chapter on murder.

Sect. 1. *Provocation.*—Pages 784–790.

This adds nothing to what is said on the same subject in pp. 711–727. See Articles 224–6.

Some cases are referred to in this section which contributed to the establishment of the general rule that to cause death by the infliction of injury intended to cause slight harm only is manslaughter, *e. g.*, A. drowns a pickpocket meaning only to duck him (*Fray's case*, p. 787); A. seeing his son bleed from a fight with another boy runs after the other boy and gives him a slight stroke with a stick, which happens to kill him (787; and see Foster, 294 for a careful discussion of the case).

Sect. 2. *Mutual Combat.*—Pages 790–798.

Repeats 727–737. See Art. 200 (*d*).

Some of the cases referred to in this section relate also to the case of one person being killed by a blow intended for another. See Art. 223 (*a*).

Sect. 3. *Resistance to Arrest by Officers, &c.*—Pages 798–848.

Nearly the whole of this section is made up of reports of cases on the authority of different persons to arrest in particular cases, on notice, &c. This seems to me to belong rather to the law of civil and criminal procedure than to the criminal law. One point of importance is, however, noticed in Art. 224 (*c*).

SECT. 4. *Killing in an unlawful, criminal, or wanton act.*—Pages 849–856.

Page 849. One person killed by violence intended for another. See Art. 223.

849–854. Negligent acts. Chapter XXII.; and see Articles 222, 223.

855, 856. See Art. 210 (iii).

SECT. 5. *Killing by a lawful act improperly performed.*—Pages 856–880.

Pages 856–864. These are cases of excess in the use of force when some force would have been lawful. See Art. 201.

864–880. These are all cases of negligence in doing acts which are or may be dangerous. Art. 216. Pages 877, 878 contain cases relating to the law as to the effect of joint negligence, Art. 220 (*e*); and at 864 are cases bearing on the degree of remoteness consistent with an act being the cause of death. Art. 219.

SECT. 6. *Indictment and Judgment.*—Pages 880–882.

As to the punishment for manslaughter, see Art. 232. The rest is omitted as belonging to the subject of procedure.

CHAPTER III. EXCUSABLE AND JUSTIFIABLE HOMICIDE.—Pages 883–898.

As the distinction between excusable and justifiable homicide is now unimportant (see 24 & 25 Vict. c. 100, s. 7), I have not noticed it.

Page 884, Sec. 1. Excusable homicide by misadventure, pp. 884–8. See Art. 210.

885–888. Gives over again what is said in 861, &c., as to manslaughter by negligence.

888–892. Homicide in self-defence. See Art. 200.

893–898. Justifiable homicide. Chapter XXI.

All the cases referred to in Russell on Crimes are thus disposed of in the different articles of the Digest. Nothing short of studying the contents of these 200 pages can give any one any notion, either of the amount of patient thought and sound good sense which have been employed in the decision of particular cases by many generations of judges, or of the immense amount of material which has been gradually accumulated by reporters, or of the

helpless bewilderment, the utter incapacity to take general views, or to see the relation to each other of different principles, or to arrange an intricate question according to the natural distribution of the subject, which characterizes English text writers. The cases above referred to, as they stand in Russell, are like the stores at Balaklava, in the winter of 1854–5. Every thing is there, nothing is in its place, and the few feeble attempts at arrangement which have been made serve only to bring the mass of confusion to light.

NOTE XV.

(TO ARTICLES 224 (*c*), 225.)

The following correspondence was published in the *Times* of Nov. 21, 1867. It refers to the case of *R.* v. *Allen and Others*, convicted at the Manchester Special Commission of the murder of Brett, a police officer, whom they shot in an attempt to rescue a Fenian prisoner from a police van in Manchester. There is no legal report of the case so far as I know, but, as will be seen, the letter of the prisoner's counsel, and the reply of Lord (then Mr. Justice) Blackburn are substantially an argument and a judgment on a matter of very great importance. I have, therefore, republished them from the *Times* with Lord Blackburn's permission.

STATEMENT submitted to Mr. JUSTICE BLACKBURN and Mr. JUSTICE MELLOR.

"REGINA *v.* ALLEN AND OTHERS.

"Upon the trial of Allen and Others for the murder of Serjeant Brett, two points of law arose, under the following circumstances:—

"On the morning of the 11th of September last, two men, who turned out afterwards to be Kelly and Deasy, were arrested by a Manchester policeman, as he alleged, under section 216 of the Manchester Police Act (7 & 8 Vict. c. 40), which enacts that it shall be lawful for any constable belonging to the police force of the borough to take into custody, without a warrant, all loose, idle, or disorderly persons whom he may find disturbing the public peace, or in his own view committing an offence against this Act, or whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanor, or breach of the peace, or to instigate or abet any such breach.

"The two men, who gave the names of White and Williams, were taken before a magistrate on the 11th, and remanded until the 18th by a warrant, which stated the charges against them to be, not for suspicion of felony, on which charge they were arrested, but for 'felony,' and omitted to specify what felony, or other offence they were charged with. They were brought up again on the 18th, when no evidence whatever was given upon the charge on which they were alleged to have been arrested, but an inspector of detectives from London, who stated he had a warrant against Kelly for treasonable practices, alleged to have been committed in Ireland, and a constable from Ireland, who was stated to have a similar warrant against Deasy, appeared, and on their application, without the production of either of the warrants, which, in fact, were not then backed as the statute required, the prisoners were again remanded for a week.

"No warrant for such second remand was produced upon the trial, but it was stated that a warrant had been signed, a copy of that signed on the 11th inst., and had been destroyed by the police after the escape of the prisoners.

"Kelly and Deasy were then placed in the prison van, for the purpose of being taken to prison, and on the way the van was attacked, the prisoners rescued, and Brett killed.

"The two questions were: 1st, whether or not Kelly and Deasy were in legal custody; and 2nd, if they were not in legal custody, whether the crime of killing Brett, in the act of rescuing them, amounted to murder or manslaughter.

"As to the first point, it would seem (1st) that the magistrate had no jurisdiction to commit for felony, no charge of felony having been made; and (2nd) that the magistrate had no jurisdiction to entertain the charge of treasonable practices committed in Ireland, or to remand the prisoners upon such a charge. By the 11 & 12 Vict. c. 42, s. 22, justices are empowered to take the examination of witnesses against persons who are brought before them charged with an offence alleged to have been committed in any county or place within England and Wales wherein they have not jurisdiction. By sect. 2 of the same Act they are empowered to issue their warrant to apprehend any one within their jurisdiction charged with having committed any crime or offence on the high seas, or in any creek, harbour, &c., or any 'crimes or offences committed on lands beyond the seas for which an indictment may legally be preferred in any place within England or Wales.' By

sect. 11, where an English warrant is backed in England, the offender, when apprehended, may be taken before the justice who issues the warrant, or, if so directed by the justice backing the warrant, before such last mentioned justice, or any other justice of the same county or place; but by sect. 12, where an Irish warrant is backed in England, the offender must be taken before the justice who granted the warrant, and there is no power to take him before the magistrate who has backed it. It would seem, therefore, that in this case the proper course would have been, in the case of Deasy, at least, for the magistrate to have backed the Irish warrant, and for the prisoner to have been taken, under the authority of the warrant so backed, to Ireland, and that the magistrate had no jurisdiction to examine any witnesses against Deasy, or to remand him upon the charge of felony.

"Thirdly.—It is laid down in Coke's Second Institute, p. 591, when speaking of prison breaking, that a *mittimus* must 'contain the cause, but not so certainly as an indictment ought, and yet with such convenient certainty as it may appear judicially that the offence (prison breaking), *tale judicium requirit* as *pro altâ proditione*, viz., *in personam domini regis*, &c., or *pro felonia*, viz., *pro morte talis*, &c.,' and he lays it down that a *mittimus pro felonia* generally is bad. So again, Hale (P. C. vol. ii. p. 122), says that a *mittimus* 'must contain the certainty of the cause, and therefore if it be for felony, it ought not to be generally *pro felonia*, but it must contain the especial nature of the felony briefly, as for felony for the death of J. S., or for burglary in breaking the house of J. S., &c., and the reason is because it may appear to the Judges of the King's Bench upon an *habeas corpus* whether it be a felony or not.' Hale, however, adds, that he does not think the absence of such particularity would make the warrant void. It is worthy of notice that in the forms of remand given by Chitty in his Criminal Law, vol. iv., pp. 33, 116, and in the form given in the 11 & 12 Vict. c. 42 (Q. 1), the felony is specifically described.

"The second point, which appears to be of the greater importance, looking at the actual direction to the jury, and to the fact that they were not asked to find the existence, contents, or form of the warrant, is whether, assuming the detention of one or both of the prisoners to have been illegal, the killing of Brett amounted to murder.

"The first case on the subject is that of Sir H. Ferrers (Cro. Car. 371), who was arrested for debt, and thereupon Nightingale, his

servant, in seeking to rescue him, as was pretended, killed the bailiff, "but because the warrant to arrest him was by the name of Henry Ferrers, Knight, and he never was a knight, it was held by all the Court that it was at variance in an essential part of the name, and they had no authority by that warrant to arrest Sir Henry Ferrers, Baronet, so it is an ill warrant, and the killing of an officer in executing that warrant cannot be murder." This case is also reported by Sir W. Jones (p. 346), where it is said to have been held not to be murder either in the servant or in the prisoner, because the warrant was not good.

"The next case is that of *Hopkin Hugget*, which was tried in 1666, and is best reported in Kelyng (p. 59). In that case, Hugget and three others pursued three constables who had impressed a man, and demanded to see their warrant. The constables showed a paper which the prisoner said was no warrant, and thereupon they drew their swords, and Hugget killed one of the constables. Of the twelve Judges eight delivered their opinion that this was no murder, but only manslaughter, and they said that if a man be unduly arrested or restrained of his liberty by three men, although he be quiet himself, and do not endeavour any rescue, yet this is a provocation to all other men of England, not only his friends, but strangers also, for common humanity's sake, as my Lord Bridgman said, to endeavour his rescue; and if in such endeavour of rescue they kill any one, that is no murder, but only manslaughter. The four other Judges held it murder, and thought the case in question to be much the stronger, because the party himself who was impressed was quiet and made no resistance, and they who meddled were no friends of his or acquaintances, but mere strangers, and did not so much as desire them which had him in custody to let him go. Although all the Judges of the King's Bench thought it murder, they conformed to the opinion of the other eight, and gave judgment of imprisonment for eleven months.

"In *Reg.* v. *Mawgridge*, which was tried in 1707 (Kelyng, 136), the Chief Justice alludes to *Hugget's Case* as having settled the law upon the point.

"In *Tooley's Case* (2 Lord Raymond, 1296), which was tried in 1710, Ann Dakin was in custody of one Bray, when the prisoners, who were strangers to Dakin, assaulted Bray, but withdrew. They afterwards assaulted Bray again, after the woman had been locked up, and killed one Dent, whom Bray had called to his assistance. One of the prisoners gave the stroke, the two others were aiding

and abetting. Seven of the twelve judges held this to be manslaughter, and five held it to be murder, one of the five thinking that the constable had authority. Those judges who held the offence to be manslaughter only, so held on the opinion that the prisoners had sufficient provocation, for if, say they, one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, much more where it is done under a colour of justice, and where the liberty of the subject is invaded it is a provocation to all the subjects of England.

"In *Reg.* v. *Adey* (1 Leach, 206), which was tried in 1779, a somewhat similar point arose, and the presiding Judge, on the authority of *Tooley's Case*, reserved the point for the consideration of the twelve Judges. The prisoner escaped in the riots of 1780, and no judgment was given, but Leach says that it was understood the judges held it to be manslaughter only.

"Again, in *Reg.* v. *Osmer* (5 East, 304), argued in 1804, Lord Ellenborough, C.J., says, that 'if a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.'

"In *Reg.* v. *Phelps* (Car. & M. 180), tried in 1841, a policeman attempted to apprehend a man on suspicion of having stolen growing potatoes. He resisted, and some persons came to his aid and killed one Southwood, whom the policeman had called to his assistance. Upon proof of these facts, Coltman, J., directed the jury that as the policeman had no right to apprehend the man the offence of those who killed Southwood was manslaughter only, and not murder.

"These appear to be the cases bearing most closely on the subject, but turning to the authority of text writers, and the *dicta* of judges, we find Hawkins, in his Pleas of the Crown (book I. chap. 31, sec. 60), stating the law as it was laid down in *Hugget's* and *Tooley's Cases*, and adding that 'since in the event it appears that the persons slain were trespassers, covering their violence with a show of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril.'

"Hale (P. C. vol. i. p. 465), also cites *Hugget's Case*, and apparently with approval.

"On the other hand, Foster, J., in his Discourse upon Crown Law (p. 312), while he appears to approve of the law as laid down

in *Hugget's Case*, combats the doctrine of the majority of the judges in *Tooley's Case*, and appears to doubt the propriety of that decision, partly upon general principles, and partly because the second assault on the constable seemed to him rather to have been grounded upon resentment or a principle of revenge for what had before passed, than upon any hope or endeavour to assist the woman.

"It is these observations of Foster, J., which Alderson, B., appears to have had in his mind when he is reported to have said in *Reg.* v. *Warner* (1 Moo. C. C. 385), that *Tooley's Case* had been overruled. *Tooley's Case* had, in fact, no bearing upon *Warner's Case*, in which no attempt was made to arrest the prisoners at all, and Alderson, B, does not refer to any authority for his statement. A similar remark was made by Pollock, C.B., in *Reg.* v. *Davis* (Leigh & Cave, C. C. 71), but there again no authority is given.

"East, in his Pleas of the Crown, vol. i. p. 325, states the question with the arguments on either side, without shewing much leaning either way; and so does Russell (Criminal Law, vol. i. p. 632), although his editor, Mr. Greaves, from his note (p. 848 of the 4th edition), appears to have been convinced by the arguments adduced by Foster.

"It would thus seem that the doctrine laid down by the majority of the Judges in the cases of *Ferrers*, *Hugget*, and *Tooley*, has been acted upon, not only in those cases, but also in *R.* v. *Adey* and *Reg* v. *Phelps*, and recognised in *R.* v. *Mawgridge*, and *R.* v. *Osmer*, and by Hawkins and Hale.

"The opposite doctrine is supported by a minority of the Judges in *Hugget* and *Tooley's cases*, and by Foster, J., and receives some sort of sanction from the observations of Alderson, B., and Pollock, C.B., if they can be considered to display a sufficiently accurate knowledge of the subject to entitle them to any weight. This view of the law, however, has never once been acted upon, and it follows that if the prisoners convicted at Manchester be executed without any discussion of the law, they will be put to death in opposition to the decided cases on the subject, upon the authority solely of extra-judicial arguments and dicta.

"In some of these arguments a distinction has been taken between the interference of a friend or a relative, and that of a mere stranger; but this distinction does not appear to rest on any authority. Hawkins in his Pleas of the Crown (Book I, ch. xxxi. ss. 56 and 57), says, that 'if a man's servant, or friend, or even a

stranger, coming suddenly and seeing him fighting with another side with him and kill the other—or, seeing his sword broken send him another, wherewith he kills the other—he is guilty of manslaughter only.' Yet in this very case, if the person killed were a bailiff, or other officer of justice, resisted by the master, &c., in the due execution of his duty, such friend, or servant, &c., are guilty of murder, whether they knew that the person slain were an officer or not.

"For these and other reasons, we are of opinion that the points raised in this case are of such a grave and serious character as to demand further discussion and consideration, and that they ought only to be decided after full and deliberate argument before the Court of Criminal Appeal.

"W. DIGBY SEYMOUR, Q.C.
"MICHAEL O'BRIEN, S.L.
"ERNEST JONES.
"JAMES COTTINGHAM.
"LEWIS W. CAVE."

REPLY OF MR. JUSTICE BLACKBURN.

"*November* 20, 1867.

"DEAR MR. SEYMOUR,

"Mr. Justice Mellor and I have received and carefully perused the paper signed by you, my brother O'Brien, and Mr. Cave.

"It contains nothing that is new to us, but it puts all the authorities in the light most favourable for your clients, and I need not say that it is a great satisfaction to us to think that nothing has been overlooked which could bear on so grave a question.

"The Legislature have by the 11th and 12th of Victoria, cap. 78, cast upon the presiding Judges the very disagreeable and invidious duty of determining whether their own view of the law at the trial is or is not so questionable as to justify an appeal. If they refuse to reserve any point made, it is still open to the prisoners to appeal to the equitable consideration of the Sovereign, but no appeal lies to any court of law.

"In the present case my brother Mellor and I considered the points raised before us on the trial, and entertained no doubt that the direction which we then gave was strictly according to law. We, therefore, reserved no question for the Court of Appeal at the time, but simply postponed our final determination on the subject

until we had the means of referring to the authorities and considering the case more at leisure. We have now considered the authorities, and have consulted the other Judges, not with a view of dividing our responsibility, nor in order to obtain a judicial opinion from them which they could not give on a point not regularly before them, but because, in a case so serious, we were very anxious to have the best advice and assistance that we could obtain for our guidance. I do not say, that if the result of such consultation and research had been to lead to the conclusion that there was doubt enough to justify a further appeal, it would have relieved us from a most painful responsibility. I regret to say that the result has been to satisfy us that the law is too clear to justify us in reserving any point for the consideration of the Court of Criminal Appeal.

"Entertaining that opinion, we have officially informed the Secretary of State for the Home Department, that there will be no further appeal to a court of law, and that it is now for Her Majesty's Government alone to determine what shall be done with the convicts.

"This decision of ours is final; but, as a satisfaction to you and the other Counsel for the prisoners, I will briefly state the reasons which have induced us to think the law too clear for argument.

"When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection around him, and consequently if he is killed in the execution of his duty, it is in general murder, even though there be such circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. But where the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and consequently the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation.

"The cases which you have cited are authorities that where the affray is sudden, and not premeditated, when, as Lord Holt says in *R.* v. *Tooley* (2 Lord Raymond, 1300), 'it is acting without any precedent malice or apparent design of doing hurt,' the mere fact that the arrest was not warranted may be a sufficient provocation.

"But in every one of these cases the affray was sudden and unpremeditated.

"In the present case the form of warrants adopted may be open to objection, and probably might, on application to the Court for a writ of *habeas*, have entitled the prisoners to be discharged from custody; but we entirely agree with the opinion of Lord Hale (2 Pleas of the Crown) that, though defective in form, the gaoler or officer is bound to obey a warrant in this general form, and consequently is protected by it. This is a point which, had the affray been sudden and unpremeditated, we probably should have thought it right to reserve.

In the present case, however, it was clearly proved that there was on the part of the convicts a deliberate, prearranged conspiracy to attack the police with firearms, and shoot them, if necessary, for the purpose of rescuing the two prisoners in their custody, and that they were all well aware that the police were acting in obedience to the commands of a justice of the peace, who had full power to remand the prisoners to gaol if he made a proper warrant for the purpose. It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant, and that they knew well that if there was any defect in the warrant, or illegality in the custody, that the courts of law were open to an application for their release from custody. We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it could justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter.

"To cast any doubt upon this subject would, we think, be productive of the most serious mischief, by discouraging the police in the performance of their duties, and by encouraging the lawless in a disregard of the authority of the law.

"We feel bound, under these circumstances, to decline to take a course which might lead to the belief that we considered the matter as open to doubt.

"COLIN BLACKBURN."

NOTE XVI.

(TO CHAPTER XXXII.)

LIBEL.

The statement of the law of libel contained in this chapter is, I believe, complete, though it is very short in comparison to the standard works on the subject.

Folkard's edition of Starkie on Slander and Libel consists of 775 large 8vo pages, besides an appendix of statutes. It contains much other matter besides a definition of the crime of libel; but that definition and the explanation of the offence itself, fill more than 150 pages.

The greater part of this mass of matter consists of illustrations, but something is also due to the singularly complicated manner in which the law has grown up.

The word "malicious" in reference to the offence of libel has been elaborated by the judges into a whole body of doctrine on the subject in the same sort of way as the words "malice aforethought" in the definition of murder.

The process was of this sort. Malice was first divided into malice in fact and malice in law—malice in fact being personal spite, and malice in law being defined to be "a wrongful act done intentionally, and without just cause or excuse."

Inasmuch as the publication of a libel must always be intentional, and inasmuch as the Courts held that to publish defamatory matter of another was, generally speaking, a wrongful act, the result of this was that every publication of defamatory matter was a crime, unless there was some just cause or excuse for it. What amounts to a "just cause or excuse" was decided by a multitude of cases. The phraseology employed in their decision has been as follows. Defamatory matter which it was considered lawful to publish has been described as a "privileged communication." This "privilege" has been regarded as rebutting the presumption of malice arising from the fact of publication; and it has further been divided into absolute privilege and qualified privilege—absolute if it justifies the publication, whatever may be the state of mind of the publisher; qualified if it justifies such publication only under particular circumstances, as, for instance, when the publisher in good faith believes the defamatory matter to be true, when the defamatory matter actually is true, and its publication is for the public good, &c.

The law thus falls into the singular condition of a see-saw between two legal fictions Implied Malice on the one hand, and privilege absolute or qualified on the other.

I will give a single instance of the intricacy to which this leads. A. writes of B. to C., "B. is a thief." Here the law implies malice from the words used. It appears that B. was a servant, who had been employed by A., and was trying to get into C.'s employment,

and that A.'s letter was in answer to an inquiry from C. Here the occasion of publication raises a qualified privilege in A., viz., the privilege of saying to C. that B. is a thief qualified by the condition that A. really thinks that he is one, and the qualified privilege rebuts the implied malice presumed from the fact of publishing the defamatory matter. B., however, proves not only that he was not a thief, but that A. must have known it when he said that he was. This raises a presumption of express malice, or malice in fact in A., and proof of the existence of express malice overturns the presumption against implied malice raised by the proof of the qualified privilege.

This machinery of express and implied malice and qualified and absolute privilege is only a roundabout and intricate way of saying that as a general rule it is a crime to publish defamatory matter; that there are, however, certain exceptions to that rule by virtue of which it is not a crime to defame a man—

(*a*) If the defamatory matter is true, and its publication is for the public good.

(*b*) Although the defamatory matter is false,

(i.) if the libeller in good faith believes it to be true, and publishes it for certain specified reasons.

(ii.) Although he knows it to be false, if he publishes it in a particular character.

By working out this scheme, and stating in general terms that the publication of a libel is always malicious unless it falls within one or more of the specified exceptions, the intricate fictions about malice in law and in fact, and absolute and qualified privilege, may be dispensed with. They are merely the scaffolding behind which the house was built, and now that the house is convenient and proximately complete, the scaffold may be taken down.

NOTE XVII.

(TO ARTICLE 281, ON POSSESSION IN RELATION TO THE LAW OF LARCENY).

I do not think it would be possible to assign to the expressions "possession," "actual possession," "constructive possession," "legal possession," senses which would explain and reconcile all the passages in which these phrases occur in works of authority. Some of them indeed are absolutely contradictory. Thus it is

said that the taking in larceny must be a taking out of the possession of the owner. It is also said that the owner retains the legal possession notwithstanding the larceny. If both of these propositions were true, it would follow that larceny could never be committed at all. Again, we are told on the other hand that the taking in larceny must be a taking out of the possession of the owner, the inference from which would naturally be that when a thing is out of the owner's possession it cannot be stolen. We are then told, in order to avoid this conclusion, that a thing is always in its owner's possession; so that a box of plate at the bottom of the Thames, things of the existence of which the owner is not aware, as money vested in him as executor, and which without his knowledge is in the actual custody of another person,[1] or a dead rabbit in his wood, are all in the owner's possession and capable of being taken out of it. This way of stating the matter makes the assertion that the taking in larceny must be a taking out of the owner's possession insignificant. If, from the nature of the case, every taking must be a taking out of the possession of the owner, it is impossible to see how the takings which do, differ from those which do not, constitute larceny. All men being mortal, it is useless to define an Englishman as a mortal man living in England. However, though it is impossible either to justify the manner in which the word "possession" is used, or to free it entirely from the fictions with which it has been connected, it is, I think, not impossible to define it in such a manner as to express all the distinctions which it is intended to mark in language differing very slightly, if at all, from that which has generally been used upon the subject.

As I have shown in the articles on theft, and in the notes upon them, there are five different ways in which theft can be committed, viz.:—

1. By taking and carrying away goods which do not belong to the thief from any place where they happen to be.

2. By converting property entrusted by the owner to a servant.

3. By obtaining the possession of property (as distinguished

[1] A put 900 guineas in a secret drawer in a bureau and died. B, her son and executor, lent the bureau to his brother C, who took it to India, kept it there for several years, and brought it back. B then sold it to D, who gave it to E to repair, who found the money. This was held to be such a taking by E out of the possession of A as to constitute larceny. *Cartwright* v. *Green*, 8 Ves. 405.

from the right of property) from the owner by fraud with intent to convert it.

4. By converting property given by the owner to the thief under a mistake.

5. By converting property bailed to the thief.

It will be found upon consideration that the distinctions between these cases all arise out of the doctrine of possession, but it is, I think, less generally perceived that the important point is not the taking out of the possession of the owner, but the taking into the possession of the thief. The five cases in question may be thus arranged:—

In No. 1 (common larceny) the thief has neither the possession nor the custody of the stolen property at the time when the theft is committed, and it is immaterial whether the owner has it or not.

In No. 2 (larceny by a servant) the thief at the time of his offence may have either the custody or the possession. If he has the custody his offence is theft. If he has the possession his offence is embezzlement.

In No. 3 (larceny by trick) the thief obtains the possession by a mistake, caused by his own fraud.

In No. 4 (larceny by taking advantage of a mistake) the thief receives the possession by a mistake not caused by his own fraud.

In No. 5 (larceny by a bailee) the thief receives the possession under a contract of bailment.

Besides this view of the subject the doctrine of possession is important in relation to procedure, and in that case the matter to be considered is not the possession of the thief but the possession of the owner. It is necessary in indictments for theft that the ownership of the stolen property should be correctly stated, and as possession constitutes special ownership (at all events, as against a thief) it is important, with a view to this subject to understand what possession implies.

Passing from the law upon this subject, let us examine the facts to which the law applies—the different relations which, as a fact, exist between men and things—in reference to the common use of language.

The most obvious case of possession is that of a person who holds something in his hand. But it must appear upon the slightest consideration that neither this nor any other physical act whatever can be accepted as more than an outward symbol of the state of things which the word denotes. Unless the article

possessed is very small, part of it only can be held in the hand, trodden on by the foot, or so dealt with by any other part of the possessor's body as to exclude a similar dealing with it by others. It would however, I think, be felt by every one that neither actual bodily contact with an object, nor even exclusive bodily contact with it, was essential to what, in the common use of language, is meant by possession. No one would think of using different words to express the relation of a man to a coin clenched in his fist, to a pocketbook in his pocket, to a portmanteau of which he carried one end and a railway porter the other, to a carriage in which he was seated whilst his servant was driving it, to a book on the shelves of his library, and to the plate in his pantry under the charge of his butler. He would, in the common use of language, be said to be in possession of all these things, and no one would feel any difficulty in perceiving the correctness of the expression even if it were added that he was not the owner of any one of them, that some had been lent, and others let to hire to him. On the other hand, any one but a lawyer would be surprised at the assertion that a man, whether the owner or not, was in possession of a watch which he had dropped into the Thames, of sheep which had been stolen from his field and driven to a distance by the thief, of a dead grouse which, having been wounded at a distance from his moor, had managed to reach it and to die there without his knowledge or that of any other person.

The common feature of all the cases to which the word "possession" would obviously be applicable is easily recognised. It is to be found in the fact, that the person called the possessor has in each instance the power to act as if he were the owner of the thing possessed, whether he actually is the owner or not. Several of the illustrations given, however, show that though this is one of the things which the word conveys, it is not the only thing conveyed by it. The butler in charge of the plate, the porter helping to carry the portmanteau, the coachman who is driving the coach, have the physical power of acting as the owner of those things as much as their master or employer. Indeed, in two of the three cases their physical control over the object is more direct than his. The difference is that the circumstances are such as to raise a presumption that their intention is to act under the orders of their superior, and that he (at least, for the present) has no definite superior whose orders he intends to obey. Take, for instance, the case of a dinner party: there is no visible difference between the

master of the house and his guests; each uses the article which he requires for the moment, and they are, from to time to time, removed from place to place by the servants; as, however, the master retains throughout not merely the legal right to dispose of them absolutely, but the immediate means of enforcing that right if from any strange circumstance it should become necessary to do so, the assertion that the plate is in his possession, and that his guests and servants have merely a permission to use it under his control, has a plain meaning; nor would that meaning be altered or obscured if the fact were added that the plate did not belong to the master of the house, but was hired by him for the occasion. Indeed, if he had stolen the plate, or received it knowing it to be stolen, the fact denoted by the word "possession" would remain. These illustrations, which might be multiplied to any extent, appear to me to show clearly that possession means, in the common use of language, a power to act as the owner of a thing, coupled with a presumable intention to do so in case of need; and that the custody of a servant or person, in a similar position, does not exclude the possession by another, but differs from it in the presumable intention of the custodian to act under the orders of the possessor with reference to the thing possessed, and to give it up to him if he requires it. Thus far, I think, my definitions correspond with the common use of language, though of course popular language upon such a subject is not, nor is there any reason why it should be, minutely exact.[1]

I will now compare it with the way in which the word is used by legal authorities. I know of no set dissertations on the subject of the use of the word "possession" in English law like those which are to be found in abundance upon the corresponding word in Roman law. It would be an endless and a useless labour to go through the cases in which the word has been used, endless on account of their great number, useless because it is the characteristic of English judges to care little for technical niceties of language in comparison with substantial clearness of statement in reference to the actual matter in hand. Upon such a matter as

[1] This view was suggested by a study of Savigny's Recht des Besitzes, which, however, deals with many topics to which nothing in English law corresponds. Mr. George Long's article on "Possessio" in the Dictionary of Greek and Roman Antiquities contains the substance of Savigny in a very convenient form. Mr. Hunter's Roman Law, pp. 195–222, may also be consulted. It is a pleasure to me to refer to this excellent book.

this, accordingly, it is better to consider the different authorities in groups than individually.

Possession (in reference to the subject of theft) is usually divided into two branches—actual possession and constructive possession.

It seems to have been pretty generally assumed that the words "actual possession" were sufficiently plain for practical purposes without further explanation; but it would be easy to show, by a multitude of cases, that actual possession differs from possession as I have defined it only in one point. It is usual to say that a thing in the possession of a servant on account of his master is only constructively in the possession of the master. But the expression "constructive possession" has another meaning besides this. As it was considered necessary that a thing stolen should be taken out of the possession of the owner, and as in very many instances goods are stolen which are not in any natural sense in the possession of any one whatever, it has become a maxim that goods are always in the possession of the owner; if not in his actual, then in his constructive possession, or, as it is sometimes called, in his legal possession.

Thus, constructive possession means:—

1. The possession of goods in the custody of a servant on account of his master, and

2. The purely fictitious possession which the owner of goods is supposed to have, although they are in reality possessed by no one at all.

The phrase thus appears to me to be objectionable, not only because it is ambiguous, but because, in the first of its two senses, it conceals a truth, whilst in the second it needlessly conveys a false impression. The truth concealed is that a man may have, and may intend to use, the power implied in the word "possession," although he acts through a servant. The false impression conveyed is that things cannot be out of possession, or that if they are, they cannot be stolen.

I avoid this by abstaining altogether from the use of the expression "constructive possession." In "possession" I include that which has to be exercised through a servant, and my language implies, that a person may commit theft on objects which are not in the possession of any one at the time of the theft. The existing law may by these means be expressed in well-recognised and established phraseology, without any resort to legal fictions.

The point upon which the most subtle questions as to possession arise, is the distinction between theft and embezzlement—a perfectly useless distinction, no doubt, and one which the legislature has on two separate occasions vainly tried to abolish. So long, however, as it is allowed to exist, it is necessary to understand it.

I have already explained how a man may retain the possession of a thing of which he gives his servant the custody. He retains a power over the thing which is not the less real or effective because he has to exercise it through the will of another person, who has undertaken to be the instrument of his will. Suppose, however, that instead of the master's having given his horse to his groom or his plate to his butler, a horsedealer has delivered the horse to the groom, or a silversmith has delivered plate to the butler for his master: I should have thought that there was no real difference between these cases; that inasmuch as the servant in each case was acting for the master in the discharge of a duty towards him, and under an agreement to execute his orders, the master would come into possession of the horse or the plate as soon as his servant received it from the dealer or the silversmith, just as he remains in possession of the horse or the plate when he gives the custody of it to his groom or his butler. I should also have thought that the servant who appropriated his master's property to his own use, after receiving it from another on his master's account, was for all purposes in precisely the same position as the servant who did the same thing after receiving it from his master. The Courts, however, decided otherwise. They have held on many occasions that, though the master's possession continues when he gives the custody of a thing to his servant, it does not begin when the servant receives anything on account of his master; on the contrary, the servant has the possession, as distinguished from the custody, until he does some act which vests the possession in his master, though it may leave the custody in himself. If during that interval he appropriates the thing he commits embezzlement. If afterwards, theft. The most pointed illustration of this singular doctrine which can be given occurs in the case of *R.* v. *Reid* (Dear. 257). B sent A his servant, with a cart to fetch coals. A put the coals into the cart, and on the way home sold some of them and kept the money. A. was convicted of larceny, and the question was whether he ought to have been convicted of embezzlement. It was held that the conviction was right, because though A had the custody

of the cart all along, yet the possession of it and its contents was in B, and though A had the possession of the coals whilst he was carrying them to the cart, that possession was reduced to a mere custody when they were deposited in the cart, so that A's offence was larceny, and not embezzlement, which it would have been if he had misappropriated the coals before they were put into the cart.

These explanations will, I hope, render the article in the Digest intelligible. In order to justify it legally, it is necessary to state the manner in which I arrived at it. I examined a large number of cases, of which I have put eleven in the form of illustrations to the article. In some of these cases it was decided that the offence was theft; in others that the offence was embezzlement. I have assumed (as I was entitled to do, as appears from the explanations given above) that whenever an offence was held to be theft the property stolen was in the possession of the owner or master, although it might be in the custody of a guest or servant; and that whenever the offence was held to be embezzlement the property embezzled was in the possession, as distinguished from the custody, of the servant. I might easily have enlarged the number of illustrations to any conceivable extent; but if those given are not enough to make the matter plain, I despair of making it plain or understanding it, and I do not wish to make it darker than it is. It is, perhaps, just worth while to add once more, that I am in this work merely stating, and not attempting to justify, the law. The technicalities on this subject appear to me to be altogether superfluous, and I think they might be easily dispensed with by redefining the offence of theft, or even by removing the distinction between theft, embezzlement, and false pretences.

NOTE XVIII.

(TO ARTICLES 390–3, ON CONSPIRACIES IN RESTRAINT OF TRADE).

It is hardly necessary to observe that these articles represent the result of the prolonged controversies, legal and politico-economical, which have attracted so much attention of late years, as to the legal position of trade unions. The whole subject has been practically exhausted in various well-known works to which I may make a general reference:—

1. Sir William Erle on the Law Relating to Trade Unions.

2. Mr. Wright on Conspiracy. 3. Roscoe's Criminal Evidence, Titles, "Conspiracy," and "Conspiracy in Restraint of Trade," 8th Ed. p. 409–428. I am responsible for these titles in Roscoe. They represent the law as it stood in 1874. Since that time it has been altered by the still later legislation embodied in and referred to by the Article.

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